AUG 1955
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 298

UNION TRUST COMPANY, ET AL.,
Petitioners

v.

EASTERN AIR LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1955

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UNION TRUST COMPANY, ET AL.,
Petitioners

v.

EASTERN AIR LINES, INC.

Petition For a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

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The petitioners, Union Trust Company and Melville W. Stuart as executors of the Estates of Ralph F. Miller and Mildred E. Miller, his wife, pray that a writ of certorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in Nos. 11,991 and 11,992 below reversing judgments of the United States District Court for the District of Columbia entered upon a jury verdict in petitioners' favor.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 221 F. 2d 62[1]. The opinion of the District Court in the

[1] The modification of opinion and judgment described hereinafter appears *infra* Appendix A 4a-5a. The opinion of the Court of Appeals is also set out in Appendix A 1a-41a of the Government's petition for a writ of certiorari in the companion case entitled

companion case against the United States is reported at 113 F. Supp. 80 (also I R. 36-46).

JURISDICTION

The judgment of the Court of Appeals was entered February 8, 1955 (U.S. 42a-44a). Petition for rehearing in banc was denied on April 15, 1955 (App. A 2a-3a) and for rehearing by original division on May 4, 1955 (App. A 3a). On petitioners' motion, by order of June 24, 1955, the judgment of February 8, 1955 was amended to limit a retrial to the issue of liability (App. A 4a-5a). Eastern's motion for rehearing on the modification was denied July 12, 1955 (Order, App. A 6a-7a; Per curiam memorandum App. A 5a-6a). By order of July 23, 1955 signed by Justice Black, the time for filing this petition was extended to and including August 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In wrongful death actions against an air carrier whose plane collided in mid air with another plane, a verdict was returned in favor of the carrier's passengers. Analyzing the weight of the evidence and inferences therefrom, and particularly the testimony of a control tower operator on the question whether he had cleared the planes to land as against other testimony tending to indicate he did not clear the carrier's plane, the court

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United States of America, Petitioner v. *Union Trust Company, et al.* That appendix and the record filed with the Government's petition will be used for purposes of this petition. Reference to said Appendix A of the Government petition will typically read "U.S. 1a" (i.e., page 1 of that appendix) whereas reference to the appendices to this petition will read "App. A —" or "App. B —". Reference to the Joint Appendix below will read "I R. 1" (i.e., Volume I page 1).

below concluded that the trial judge erred in submitting that question to the jury and in not accepting the version of the control tower operator as a matter of law, and therefore reversed and remanded for new trial on the issue of liability. The questions thus presented are:

1. Whether the extensive appellate excursion into relative credibility and probative weight of evidence under the *guise* of a determination as to the legal sufficiency of the evidence constitued an unwarranted intrusion into the jury's exclusive province and a deprivation of the constitutional right to a jury trial.

2. Whether on disputed evidence, an appellate court can take from the jury the power of determining whether testimony "negative" in form is so in substance and what probative weight is to be given such testimony as against the opposing uncorroborated affirmative testimony of a single witness, and direct the jury as a matter of law to accept the version of that witness notwithstanding that he had been severely impeached and contradicted.

3. Whether, assuming *arguendo* that there was no opposing testimony, a court should instruct the jury as a matter of law to accept the uncontradicted assertion of an interested witness whose credibility has been substantially assailed and whose testimony on most other critical points has been impeached and contradicted.

STATEMENT OF THE CASE

A. In General

As with the companion cases against the United States, these are test cases representative of extensive litigation arising out of a mid-air crash of November 1, 1949 between a military type P-38 and an Eastern Air Lines DC-4, fatal to the 51 passengers and 4 crew of the latter plane.

In wrongful death actions against the operators of both planes and against the United States of America, as owner and operator of Washington National Airport and its control tower (I R. 2-5, 7-10, 12-14), petitioners claimed that Eastern was concurrently responsible for the crash by reason of several acts of negligence by its pilots including, *inter alia,* attempting to land without clearance from the control tower (See pre-trial order, I R. 21-26; see also jury charge at X R. 2107 et seq.). After appropriate instructions (X R. 2091 et seq.) not here in issue, the jury returned a verdict of $50,000 on account of the death of Mr. Miller (I R. 55-56, X R. 2123-2124) and $15,000 on account of the death of Mrs. Miller (I R. 56-57, X R. 2124) after returning answers to special interrogatories with respect to negligence of the private defendants and the situs[2] of the collision (X R. 2123-2124). Motion for new trial was denied (I R. 48A).

On appeal by Eastern, the court below reversed both judgments and remanded for a new trial (U.S. 42a-44a) on the ground that the "negative" testimony of the witness Shaw (the co-pilot of a commercial plane that was approaching to land at Washington National at the time of the crash) that Eastern was not given a clearance to land coupled with claimed corroborating circumstances did not rebut the otherwise uncontradicted statement of the Washington tower controller, Tigner, that he had cleared Eastern to land. The court below held that it was error to have submitted this claimed act of negligence to the jury and remanded for a new trial because it said it could not determine whether the verdict was predicated on this or other of the claimed acts of negligence (U.S. 22a-23a). Subsequently, on petitioners'

[2] The importance of the situs problem, not in issue here, appears in footnote 2 of the opinion below (U.S. 3a; also 221 F. 2d at 64).

motion, the court below amended its opinion and judgment so as to remand for retrial of the issue of liability only (Order of June 24, 1955, App. A 4a-5a), leaving intact the jury's determinations as to situs and damages (see order and opinion of July 12, 1955, App. A 5a-7a, denying Eastern's motion for rehearing on modification).

B. The Pertinent Evidence

1. *In General*

This petition is largely grounded on the necessity of this Court's exercising its supervisory jurisdiction to avoid emasculation of the constitutional right to jury trial under the guise of appellate review as to the legal sufficiency of the evidence where that review usurps the jury's sole prerogative of evaluating questions of credibility and the relative weight and force of conflicting evidence and inferences. In consequence, it unfortunately becomes necessary to refer to the evidence in some detail so as to demonstrate the excesses below. Because of the size of the record, that process would unduly tax this petition and, accordingly, with the Court's indulgence, petitioners refer the Court to the factual recitals and background set out in the opinion below (U.S. 3a-21a; also 221 F. 2d 65-720) which petitioners request the Court to consider as incorporated herein and to be read at this juncture. While petitioners do not subscribe to all the detail and nuances thereof, as will be partially indicated hereinafter, those recitals do furnish an adequate overall picture of the factual situation involved.

Insofar as pertinent here, petitioners' principal difference with the factual assertions in the opinion below relates to the treatment of the testimony of the witnesses Tigner (the key tower controller) and Shaw (the co-pilot of the National Airlines plane), upon which the decision below turned. This testimony will be discussed in the

light of the conclusion, upon which the decision below was based, that Tigner's repeated and unshaken positive assertion that he cleared the Eastern plane to land is unimpaired by the Shaw testimony which, because Shaw was inattentive and not in a position to hear all radio messages for a certainty, is purely "negative" in character.

2. *The Actual Tigner Testimony—Its Lack of Credibility*

The court below *assumed* Tigner's credibility (and that the jury was *required* to believe him) in leading to its finale that " . . . Tigner testified positively that he cleared the DC-4 to land . . . [and] he adhered to that statement despite vigorous cross-examination" (U.S. 16a-17a). In so doing, the court omitted any reference to the plethora of evidence contradicting and impeaching Tigner on almost every single phase of his testimony including his story of the alleged clearance [3]. Again to avoid burdening this petition but to support petitioners' characterization of the Tigner testimony there is attached hereto as Appendix B a comparative chart of the testimony of Tigner and others on various important points in the case. Contrary to the impression given by the opinion below of a reliable and unshaken Tigner testifying he cleared Eastern to land, this comparative chart plainly demonstrates that Tigner was impeached, self-impeached and contradicted on the circumstances of the alleged clearance and on all other aspects of his testi-

[3] There was not one scintilla of evidence corroborating Tigner's story that he cleared Eastern. None of the other men in the control tower could confirm Tigner as to the alleged clearance (VII R. 1562, VIII R. 1575, 1549) although they were not very busy at the time (VII R. 1394, 1409) and, strangely enough, claim to have heard the other alleged transmissions between Tigner and the P-38.

mony to the degree that not one shred of credence could be given anything he said.[4]

3. *The Shaw Testimony—Its Probative Force*

The opinion below similarly miscasts the Shaw testimony, as well as other evidence tending to show that Eastern was not cleared to land.[5] To appreciate the significance of Shaw's testimony, it is necessary to understand the procedures for planes approaching Washington National Airport—which the court below either ignored or did not fully grasp. It is undisputed that as a commercial flight approaches from the north it is on its own company radio frequency (on which it has remained since leaving the last airport). That company frequency (like any other frequency) is in effect a party line and transmissions thereon can only be heard by planes tuned to that party line. When the plane reaches the Beltsville, Maryland area, it switches its radio transmitter and receiver to Washington ATC (Air Traffic Control), a separate and distinct frequency or party line (120.3 megacycles) for planes approaching the Washington airport before they have come under control tower jurisdiction. The plane reports to Washington

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[4] Even the trial judge disbelieved Tigner, as shown by his findings in the companion cases involving the United States, e.g., that Tigner cleared the P-38 to land (I R. 44, 51) which Tigner had vigorously denied. And the jury obviously disbelieved him.

[5] For example, the opinion omits any reference to the unrebutted testimony of a field mechanic, Kirby, that the Eastern DC-4 did not actually follow the landing pattern, but instead cut right across the field and the concourse of the terminal building (II R. 280) which not only reflects on Tigner's credibility and the opinion's assertions that the DC-4 entered the pattern around the field, but which is one of the many separate strands of circumstances upon which the jury could have fairly concluded that Eastern was attempting to land post haste without clearance. The evidence that Eastern was late, so cavalierly disposed of below (U.S. 15a-16a) is of similar import and corroborative of Shaw's testimony that no clearance to Eastern was transmitted by the tower.

ATC (not to be confused with the control tower which is physically a separate entity with separate duties and activities) and ATC then directs the plane to switch over to the control tower, whereupon the plane again rotates its radio selector switch in order to cut in on the separate and distinct radio channel or party line for communication with the control tower (119.1 megacyles). Thereafter, the plane remains on the control tower frequency until it has landed and on that frequency, and only that frequency, receives messages authorizing clearance into the pattern, clearance to land, concerning conditions for landing (weather, wind, runway, etc.), other traffic in the pattern, etc.

Understanding this approach and communications sequence, the Shaw testimony is impressively different from that purportedly summarized in the opinion below. Shaw repeatedly testified: (1) that as his plane approached Beltsville, his pilot (Porter) switched from company to ATC frequency and he (Shaw) *immediately* heard the Eastern plane reporting itself to ATC and being advised to contact the tower (both he and Porter wore head set receivers throughout, see fn. 6 and text *infra*); (2) that the Shaw plane *immediately* went through the same procedure on the ATC frequency; (3) that as the Shaw plane *immediately* switched to the tower frequency, Shaw heard Eastern reporting to the tower and being instructed to enter the left traffic pattern for landing on Runway 3; (4) that *immediately* upon the completion of that transmission, the Shaw plane went through the same procedure with the tower and was similarly cleared into the pattern. That sequence and the fact that the messages and responses were almost instantaneous, one after the other, was repeated several times in the Shaw testimony (See, e.g., I R. 82, 84, 111, 115).

Shaw's testimony continued to show unequivocably: (1) that from the time the Eastern DC-4 and his plane

first switched to the tower frequency, Shaw's plane continued to be tuned to that frequency (I R. 85, 90, 92, 99, 117, 140); (2) that he *never* took his radio earphones off,[6] (3) that during this entire period, the tower frequency (119.1) was very quiet, with only three users, Shaw's plane, the Eastern plane and the tower (I R. 90); (4) that Shaw was very attentive to transmissions over this frequency, shown first by his effort to locate the Eastern DC-4 when he heard it over the radio (I R. 84) and second, by his attempt to locate the P-38 when he heard the tower mention it (I R. 90); (5) that there was nothing to distract Shaw's attentiveness to radio messages (such as log entries to make (I R. 124)); (6) that from the time Eastern and his plane reported to the tower from Beltsville in quick and immediate succession until after the accident, there were no transmissions over the tower frequency by anyone (i.e., Eastern, Shaw's plane or the tower) except two—the first to the effect "Eastern, traffic a P-38. . . ." which he (Shaw) heard when his plane was in the vicinity of the Armory (I R. 90), and the second and last "Look out for the P-38" which he heard about one minute later as his plane approached Haines Point (I R. 99).

Based on its misconstructions of and omissions from the Shaw testimony, the court below reached the wholly unsupported and protagonist-like conclusion that "It is an unquestioned and unquestionable fact that Shaw was not in a position to hear messages from the tower during all the critical nine-minute period" (U.S. 18a). However, as already shown: (a) Shaw was tuned to the tower

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[6] In footnote 5 (U.S. 16a) the opinion unfairly states that Shaw "qualified" his testimony about keeping on his earphones, quoting a portion of his cross-examination. In the context of his entire testimony and absent his voice inflection when he so testified, this is entirely unwarranted. It ignores repeated earlier testimony that he had his earphones on during the entire critical period (I R. 92) and that this was required (I R. 76).

frequency (and remained thereon) almost instantaneously after Eastern tuned to that frequency, whatever time that may have been, so that Shaw could have heard any message between the tower and Eastern, and; (b) from the time Eastern and Shaw's plane were cleared into the pattern, in immediate succession during the very first few seconds both tuned to the tower frequency, Shaw's plane never again called the tower until after the crash (see I R. 90 where Shaw states there were no transmissions on the frequency other than as above stated).[7]

This leads to the last important but erroneous factual assertion below about Shaw: that since Shaw could not have heard Eastern cleared into the pattern, he apparently heard it cleared to land and confused the two (U.S. 19a-20a). That this is sheer fantasy is evident in part from the fact that no such hypothesis was advanced by Eastern. From the earlier discussion of approach and communication procedures and the Shaw testimony, it is clear that Shaw's plane was on the tower frequency almost from the moment Eastern was. (By *almost* we mean that though not at the same precise

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[7] The court below supported its argument largely on the basis of time discrepancies. However, Shaw's assertions of times were only approximate and based on memory (I R. 113, 119). More important, the only factor showing possible error in that regard is the pre-trial stipulation between counsel that Eastern was cleared into the pattern at 11:37 whereas Shaw indicated it was about 11:41-11:43. On the basis of this stipulation, the court says "Shaw did not hear . . . the tower clear Eastern to enter the traffic pattern." (U.S. 19a). This is utterly unsound and beyond the appellate province. First, what basis is there in the record for telling Shaw, a trained, intelligent and honest pilot, what he heard or could have heard where routine commercial aeronautical experience is involved? Second, is Shaw not to be believed because counsel may have blundered in making a pre-trial stipulation prior to a full exploration of the facts? Third, even if Shaw made a mistake as to the exact times (or if clocks or watches did not exactly coincide), it certainly does not follow that he did not hear what he said he heard.

moment, there was still not enough of an interval for a message to get through.) Thus it was impossible for Eastern to have had any earlier communications with the tower because Eastern had previously been on the ATC frequency and before that on its own company frequency. Therefore, that first communication which Shaw heard between the tower and Eastern necessarily was a clearance to enter the pattern *not* a clearance to land which sequentially is not given until the approaching plane is in the immediate vicinity of the field.

Whether or not Shaw was mistaken as to exact times (see fn. 7, *supra*), one thing is certain—that is, when Shaw tuned into the tower frequency *immediately* after Eastern had, he heard Eastern cleared to enter the pattern, whether it was 11:38 or 11:42, *unless* Shaw was lying. And whether he was lying was for the jury—not the court below—to determine.[8]

4. *The Evidence in Summary*

As indicated, the function and limits of this petition and the length of the record will not permit of an exhaustive treatment of the evidence or of its tortured treatment below. However, the foregoing highlighted analysis reflects that as opposed to the Court of Appeals portrayal of an unimpeached and unshaken Tigner story that he cleared Eastern to land with purely "negative" and inconclusive testimony by Shaw that such a message may not have been transmitted, there is on the

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[8] Implying that Shaw's trial testimony on the clearance message was of recent fabrication, the opinion refers to a statement by Shaw during the C.A.B. investigation (more than 3 years earlier) where Shaw was reported as saying he heard Eastern given a landing clearance (U.S. 20a). The court below fails to mention that Shaw testified that this statement was corrected within a few days, saying that ". . . if you will check my [C.A.B.] hearing, I corrected that before Mr. Jones. There was misuse of the words 'landing clearance'" (I R. 118).

record, the fact that the Tigner story came from the mouth of one who was interested, biased and who lied while the Shaw testimony was forceful and convincing that such a clearance had not issued. At the least, where the only question for the Court of Appeals was as to the *legal* sufficiency of the evidence, there was more than ample basis for submission of the question to the jury.

REASONS FOR GRANTING THE WRIT

The Decision Below Is a Shocking Invasion of the Jury's Function, a Gross Impairment of the Right to Trial By Jury and Contrary To Standards For Judicial Review Long Established By This Court.

Wholly apart from its limiting and far-reaching effects on the rights and fortunes of the surviving families of the many killed in this air disaster, the decision below again requires the exercise of this Court's supervisory jurisdiction to prevent the alarming departure from the historical and constitutional dichotomy of functions between judges and juries.

Time was when the time honored and time tested appellate rule for ascertaining the sufficiency of the evidence to support a verdict was based not on the weight of the entire evidence as independently evaluated by the reviewing judges, but rather on the existence of any substantial evidence on which a jury of reasonable men might have decided as they did. In correcting appellate invasions of the jury's province, that rule has been repeatedly emphasized by this Court because

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment, a right so fundamental and sacred to the citizen . . . should be jealously guarded by the courts."

Opening lines of opinion in *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. ed. 1166, 1168 (1942), reversing circuit court of appeals' affirmance of district court's dismissal of negligence action "at the close of the plaintiff's case upon the ground that he had failed to prove facts sufficient to justify submitting to the jury the issue of the defendant's negligence."[9]

The scope of the jury function inviolate from judicial tampering is well described in *Aetna Life Insurance Co.* v. *Ward*, 140 U. S. 76, 88, 35 L. ed. 371, 376 (1890):

> "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function."

Thus, in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. ed. 525 (1943), this Court, finding "No reason . . . why we should abdicate our duty to protect and guard that right [to jury trial]" where a verdict for plaintiff was upset by the circuit court because of alleged insufficiency of evidence of defendant's negligence, granted certiorari and reversed because:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could

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[9] Quotation from per curiam opinion of Second Circuit in same case. 119 F. 2d 800, 801 (1941).

> have drawn different references or conclusions or because judges feel that other results are more reasonable."

To similar effect see *Gunning* v. *Cooley*, 281 U. S. 90, 74 L. ed. 720 (1930).

In many ways parallel to the issue on this petition is the decision in *Lavender* v. *Kurn*, 327 U. S. 645, 652-653, 90 L. ed. 916, 922-923 (1945) where, in a wrongful death case, the critical question was whether the decedent was murdered or killed by a mail hook protruding and swinging from defendant's train. On certiorari, reversing the Supreme Court of Missouri which had reversed a trial judgment in a jury action, this Court stated:

> "We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.
>
> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.
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> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing

what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis supplied.)

For a similar decision on certiorari, also involving circumstantial proof as to how death was occasioned, where this Court granted certiorari and reversed a circuit court judgment setting aside a jury verdict, see *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906 (1914).

Inexplicably ignoring these long standing guides for appellate review, the opinion below wanders through the cold record, selecting at random that which the court chooses to believe or rely upon, thus denying the right—the exclusive right—of the jury to weigh relative probative force and credibility of the various pertinent items of evidence.

Illustrative is the initial error of the opinion wherein the court states that the Eastern plane was struck "from above and behind", whereas under the evidence the jury may have properly concluded, and probably did conclude, that the DC-4 cut in front of and nosed up into the P-38, which conclusion was amply supported by the technical evidence.[10] While that error does not directly bear on

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[10] There was some evidence supporting the court's statement. On the other hand the statement omits the established fact that except for the last seconds (at the most 15 seconds since the DC-4 was on "final" for only ¼ to ½ mile at 120 m.p.h.), the P-38 was on a straight in approach and the DC-4 swung in a wide arc to

the sole issue upon which the decision below turned (i.e., whether Eastern was cleared to land), nevertheless it does reflect an unaccountable and improper appellate disposition to recast the facts on appellate visceral reaction as to whether to accept or reject the truth of bits of testimony. That new disposition must necessarily undermine the jury system. The emphasis would shift from a criterion whether reasonable men could differ to whether the appellate court thinks the jury's verdict was correct in the light of what the particular division[11] of the appellate court thinks the verdict should have been had it sat as a jury of three.

The opinion below suggests a predisposition against the jury system—rumblings of which have been heard in other quarters—for no matter what the sugar coating or the trappings of verbiage, in fact, the appellate court has pre-empted the jury's exclusive prerogative of evaluating credibility of witnesses, weighing the probative force of conflicting testimony and determining which of conflicting inferences is to be controlling.

Beyond ruling that the so-called "negative" testimony of Shaw could not be given any probative value by the jury, the court has in effect ruled as a matter of law that

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cut in front of the P-38 (See e.g., Plaintiffs' Exhibits 1 and 8, XI R. 2125, 2129; cf. trial court's charge at X R. 2113, as to which Eastern has not claimed error). More important, the statement overlooks the testimony of a C.A.B. expert (Pahl) who, from his examination of the wreckage, concluded that at impact there was little difference in the attitudes or the horizontal speeds of the top planes and that the impact could have been caused by the movement of either plane or "by one coming up a little bit and one coming down a little bit" (V R. 1017-1018).

[11] In *Alexandria, Barcroft & Washington Transit Co.* v. *Cox*, No. 12345, decided March 3, 1955, Judge Miller who wrote the opinion below in the instant case again favored upsetting a jury verdict rendered as conflicting evidence, but his view did not prevail because the other two judges who constituted the panel for that case (Bazelon and Washington) voted in a per curiam opinion not to upset.

Tigner told the truth when he testified that he cleared Eastern to land and that the jury was *required* to accept that statement as truth. Yet both judge (see fn. 4 *supra*) and jury obviously disbelieved Tigner in which they were amply justified (See Appendix B).[12]

We have not been able to find a single case comparable to that at bar where the function of resolving credibility and selecting between conflicting evidence and inferences was taken from the jury and its exclusive and traditional province thus invaded by an appellate court. And rightly so, because it behooves judges to resist ". . . the seductive argument [often] made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other".[13] Indeed were that practice condoned, the tendency would be to reduce the jury to a mere formal appendage.

The same gross departure from constitutional tradition is apparent in the treatment of Shaw's "negative" testimony. The court below notwithstanding, the record shows beyond peradventure of doubt: (1) that Shaw was tuned to the tower frequency all of the critical time that Eastern was; (2) that Eastern could not have been tuned to the tower earlier; (3) that Shaw could not have confused a message clearing Eastern into the pattern with a clearance to land and that the initial message he heard had to be the former; (4) that after this initial message, followed immediately and almost instantaneously by a simi-

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[12] As noted in our original brief below (p. 11), this is not a case of minor inconsistencies in the two versions of the accident, but rather one where the two versions wholly and irreconcilably conflict to such a degree that one must necessarily conclude either Tigner or Bridoux (the P-38 pilot) was a liar. See App. B *infra*. Towards the end of the trial, the judge remarked [at the bench] that "I don't think anybody questioned Bridoux' veracity at all." (X R. 2048).

[13] From opinion of Chief Judge Parker in *Burcham* v. *J. P. Stevens & Co., Inc.*, 209 F. 2d 35 (C.C.A. 4, 1954).

lar clearance into the pattern for Shaw's plane and until after the accident, Shaw's plane was not transmitting so as to create the possibility of blocking incoming transmissions; (5) that Shaw was paying attention to the messages on the frequency, looking for the Eastern plane and the P-38 when they were mentioned on the frequency, and; (6) that the tower frequency was then not busy, being used only by the tower, Eastern and Shaw's plane.

With all this—shown by the record but overlooked, ignored or misunderstood in the court's statement of the facts—Shaw's testimony rises far above the conventional understanding of "negative" testimony. Shaw was an impressive witness with an excellent aeronautical background, civil and military, and of obvious ability and integrity. And though these factors, judged face to face, must necessarily play an important part in determining the weight to be given Shaw's testimony, an appellate court here states that as a matter of law he must have been mistaken. We submit that a careful re-reading of his testimony in the light of each assertion in the opinion below must convince this Court of the injustice resulting from the misinterpretation of the Court of Appeals.

As a matter of fact, Shaw actually testified affirmatively that Eastern was not cleared (I R. 92)—a record fact which the court also overlooked in its opinion. He obviously and sensibly based this categorical statement on the fact that if any clearance to land had issued to Eastern, he was in a position to and would have heard it and remembered it.[14] This testimony was affirmative, positive

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[14] Again, the court incorrectly questions Shaw's attentiveness when it asserts (U.S. 20a-21a) that he testified with respect to the tower message "Eastern, traffic, a P-38 . . ." that the direction did not "register". Shaw testified that when he used the word "register" he meant that whatever the direction given was he had no recollection of it [3 years later] at the trial (I R. 91-92).

and not objected to; it was sufficient without more to create an issue against Tigner's sole uncorroborated testimony that he did clear Eastern. Obviously, as an intelligent pilot at the controls and wearing earphones coming into a busy airport, Shaw was very much concerned with messages being broadcast on his radio frequency concerning landings. His being at the controls of the plane hardly detracts from his concern, interest and care to note all broadcasts that might affect his handling of the controls. He would be particularly concerned with a clearance broadcast to the Eastern plane, which he already knew had been cleared into the pattern immediately before he was so cleared, the movements of which would vitally affect and determine his own actions. He made this evident by his testimony that when he heard Eastern reporting and cleared into the pattern, he immediately looked around to locate it (I R. 84).

Conceding, *arguendo*, the hypothesis below that negative testimony is not entitled to the same probative weight as positive affirmative testimony (the springboard for the ultimate conclusion that Shaw's testimony did not rebut Tigner's on the clearance issue), there remains no excuse for the action below. Its logic, or rather illogic, are the false companion assumptions: (1) that testimony is either black or white, positive or negative, and (2) that whether testimony is truly negative, i.e. whether the witness was attentive and in a position to see or hear, is for judges to determine rather than for the jury. Here is the gist of the appellate court's invasion of the jury function. Whether Shaw's testimony was negative in form, it was the sole function of the jury to determine whether that testimony was substantively negative and the weight to be given it. In this case, the jury reasonably could (and undoubtedly did) conclude that the probative weight of the Shaw testimony was substantial because he was, in fact, in a position to hear and was attentive. Since, at the least, reasonable men could have differed on this, ju-

dicial authority does not extend to dictating to the jury what their conclusion should be as to whether a witness was attentive and in a position to have observed. The sole judicial intervention, if any, in the making of such a determination should properly be limited to trial court instructions, if requested (which Eastern did not), calling the jury's attention to the qualitative difference between positive and negative testimony to be considered by the jury in arriving at the probative weight assigned each.

In summary, the opinion below parallels a jury argument, culling the testimony and inferences, and selecting those which impress the proponent—a far cry from the appellate function. Indeed, the departure becomes more evident in the attempted disposition of those circumstances, which petitioner urged corroborated Shaw's no clearance testimony. Apart from the error in the analysis or omissions of pertinent evidence in this regard (see fn. 5 *supra*), petitioners question the opinion's technique in isolating each of these corroborative circumstances and then concluding as to each thus separately considered that it is without substantial weight as evidence of lack of clearance. One can never see a forest by confining the sight to a single tree or a series of single trees. Apart from the direct denial of clearance as discussed above, we have not argued and do not argue that any one of the circumstances considered separately in a vacuum would be sufficient to prove Eastern was not cleared. We do urge that their combined effect coupled with the forceful and substantial Shaw testimony unquestionably raised a substantial issue for the exclusive fact finder—the jury—as to whether an impeached and contradicted Tigner was to be believed in his uncorroborated word that he had cleared Eastern to land.

With respect to Eastern being late, we never suggested it was any more than circumstantial evidence to be considered by the jury with other evidence on the clearance issue, just as in automobile negligence cases it has al-

ways been considered relevant and probative that the person charged with speeding was late for an appointment. Thus Eastern's lateness was a circumstance which, though not of itself proof of lack of clearance, was one of the "separate strands of circumstances" which when added to others gathered probative force.

Of similar probative value and effect—though, as noted, completely overlooked by the court below—was the Kirby testimony (see fn. 5 *supra*) and the fact that *not one of the other seven controllers in the tower* (including the three—Union, Davis and Rydstrom—who testified) *corroborated Tigner's alleged clearance to land.* Yet those who testified did allegedly hear and testified in minute detail with respect to all of the other of Tigner's alleged communications during the critical period.

II.

The Court of Appeals Erroneously Concluded That the Jury Must Accept the Uncontradicted Testimony of A Witness Whose Credibility Had Been Substantially Assailed; That Decision Conflicts With Decisions of This Court and Several Circuits.

After having improperly discarded all opposing testimony, the court below held that the jury was bound to accept Tigner's word, that a jury is required to believe the uncontradicted assertion of an interested witness whose credibility has been substantially assailed. However, opinions of this Court, and the Circuits and state courts demonstrate that where, as here, a witness has an obvious interest in the outcome of the case and his general credibility has been seriously and substantially opened to question because of impeachment, contradiction and self contradiction on other material facets of his testimony—then *any* and *all* of his testimony, whether or not directly contradicted, is necessarily to be passed upon by the jury.

The settled rule that the credibility of witnesses is for the jury applies even to uncontradicted testimony. Thus, in *Quock Ting* v. *United States*, 140 U. S. 417, 35 L. ed. 501 (1891), a deportation case, where the trial court disbelieved the uncontradicted testimony of the petitioner and his father who swore that the petitioner was born in the United States, this Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, *although there be no adverse verbal testimony adduced.* (Emphasis added.)[15]

Similarly in *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408 (1898), where, in an attach-

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[15] Citing *Elwood* v. *Western Union*, 45 N. Y. 549 (1871) where, as to the uncontradicted testimony of an employee of a party, the court said:

> "The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility . . . . And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached . . . . Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject

ment suit, there was uncontradicted testimony by the assignees of a prior effective assignment of the goods sought to be attached, the trial court's submission of this issue to the jury was upheld by the Court which stated:

> ". . . while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the very courts that lay down this rule qualify it by saying *the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.*" (Emphasis added.)

Reaffirmed in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 88 L. ed. 967 (1944). See also *The Indien*, 71 F. 2d 752 (C.C.A. 9, 1934); *Ammons* v. *King*, 133 F. 2d 270, 272 (C.C.A. 8, 1943); *Rosenberg* v. *Baum*, 153 F. 2d 10, 13, 14 (C.C.A. 10, 1946); *Quon* v. *Niagra Fire Ins. Co.*, 190 F. 2d 257, 259 (C.C.A. 9, 1951).

Judge Jerome Frank, whose public writings and opinions certainly do not reflect any strong attachment to the jury system in civil cases, said of the so-called uncontradicted testimony rule (in an opinion in which Judges Hand joined):

> "Whether the so-called 'uncontradicted testimony' rule (the rule that such testimony is binding) has been adopted by the Supreme Court we are not at all sure. Sponsors of that rule point to *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 75 L. ed. 983. But there the Court was at pains to explain that the testimony of the witness . . . was 'so completely corroborated by the undisputed facts . . . as to put it beyond the reach of a fair doubt.' The rule, absent such qualifications, has been rejected in

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matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their [defendant's employee's] evidence and to require that the jury should pass upon evidence and to require that the jury should pass upon the weight to be given to their statement."

several states, and has little to commend it rationally. For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' . . . The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court' . . . 'The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him. The alleged 'rule', if taken literally, would return us to the practice of 'trial by deposition', which common-law procedure rejected and which, in recent years, has been rejected in federal non-common law trials as well."

". . . Demeanor, to be sure, is no infallible guide, to reliability of testimony; yet, as matters now stand, it is one of the best guides available."

". . . assume, arguendo, that the rule prevails in the federal courts . . . among the exceptions to the rule is this: It is inapposite if the witness has an 'interest'." [16]

The peculiar and exclusive advantage of the trier of fact to observe and consider the demeanor of the witness in weighing the probative value of his testimony was also recognized in *Elzig* v. *Gudwangen*, 91 F. 2d 434, 440 (C.C.A. 8, 1937) holding that the defendant's uncontradicted testimony as to the position of the wheel of his truck with relation to the shoulder of the road should go to the jury in a negligence action.

See also *People* v. *Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548 (1896) stating:

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[16] *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d. 77, 79-81 (C.C.A. 2, 1949).

"A witness may be discredited even when not contradicted . . . . His manner upon the witness stand, his halting and quibbling in answering questions, may satisfy both the court and the jury that he is swearing falsely and yet no witness may be in existence that could contradict his testimony. He may have told a probable story, and yet it may have been false and rendered incredible by reason of his character and manner."

To the same effect is *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86. (C.C.A. 9, 1953) stating:

"[Respondent] says: 'It is well settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to accept it.' This is an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary. It overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness,—his demeanor,—when his testimony is given orally in the presence of the trier of facts."

In *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.C.A. 2, 1952) this thought was expressed by Judge Learned Hand as follows:

"The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is,

there is no alternative but to assume the truth of what he denies."

If ever there were a case where record and non record factors potentially bore on the credibility of testimony, this is that case. Tigners' interest and defense alignment were obvious. His job and air controller certificate may well have depended on his giving an acceptable account of his part in the accident. If he were to retain his job, he had to continue to work with the regular commercial airlines (including Eastern) using the field. If Bridoux had died—which, shortly after the accident when Tigner's story was framed, was undoubtedly anticipated—the easiest way out for Tigner was to put the whole blame on Bridoux and exculpate Eastern. And even if Bridoux survived, Tigner undoubtedly thought his word would be accepted over that of a foreign pilot. Moreover, as an employee of the other defendant, the United States, Tigner was required to explain why he did not divert the Eastern plane earlier if he had not cleared it to land. Finally, when the C.A.B. investigation began, Tigner may well have erroneously stated that he cleared Eastern to land and thereafter feared to change that statement because of his concern whether he would then be believed in anything and whether he would lose his job.

But beyond the matter of his evident interest, Tigner's demeanor and manner of testifying was of vital importance. Can any reviewing court say that the jury could not have considered his total inability to explain all of the details surrounding the alleged clearance message and his numerous self-contradictory statements as to where the Eastern plane then was? From the cold record can any reviewing court describe Tigner's gestures or facial expressions when he stated he cleared Eastern? Can it know whether he fidgeted or can it describe his intonation?

Disregarding those decisions of this Court and lesser courts noting that adherence to the jury system requires that even uncontradicted testimony pass jury scrutiny where serious questions of credibility have been raised, the court below has further departed from its function and invaded those of the jury.

CONCLUSION

The decision below is grounded upon an apparent indifference to the jury's exclusive function and right to judge credibility of witnesses and to weigh the probative force of conflicting evidence and inferences. It represents a gross and alarming departure from our constitutional jury tradition which should be checked here before it gets out of bounds. If the many families affected are to be protected, if more than lip service to the jury system is to be compelled, if appellate review of the *legal* sufficiency of evidence to support a jury verdict is to be kept in historically proper channels and if the fate of litigants is not to be determined by a retrial before an appellate jury of three—then the action of the Court of Appeals must be reviewed and reversed here. Accordingly, in the exercise of its supervisory jurisdiction, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

For Opinion and Judgment of United States Circuit Court of Appeals for the District of Columbia Circuit see Appendix A, 1a-41a and 42a-44a of Government Petition For a Writ of Certiorari entitled *United States of America, Petitioner* v. *Union Trust Company, et al.*

Filed Feb 28 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

January Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion for enlargement of time to March 25, 1955 to file a petition for rehearing in banc or by the division which heard the cases, to file a motion to clarify or modify judgments in the event rehearing is denied, and to stay the mandate of this Court, it is

ORDERED by the Court that the time within which a petition for rehearing in banc, or a petition for rehearing, and the time for filing a motion to clarify or modify the judgment be, and it is hereby, extended to March 24, 1955.

It is FURTHER ORDERED by the Court that the issuance of the mandate of this Court be, and it is hereby, stayed to and including March 24, 1955.

Per Curiam.

Dated: February 28 1955

Filed Apr 15 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' petition for a rehearing in banc or by the original division in the above entitled cases, it is

ORDERED by the Court that insofar as petition is made for a rehearing in banc, the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 15 1955

Chief Judge Stephens and Circuit Judge Bazelon did not participate in the foregoing order.

Filed May 4 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Incorporated, Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Acting Chief Judge, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' petition for rehearing by the division which heard the above-entitled cases, it is

ORDERED by the Court that said petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: May 4 1955

Filed Jun 24 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion for leave to file a motion to clarify or modify judgments in the above entitled cases, and it appearing that said motion to clarify or modify judgments has been lodged with the Clerk, it is

ORDERED by the Court that the Clerk be, and he is hereby, directed to file forthwith appellees' motion to clarify or modify judgments; and upon consideration of appellees' motion to clarify or modify judgments, and of appellant's reply and opposition thereto, it is

ORDERED by the Court that the opinion of this Court entered herein February 8, 1955 be, and it is hereby, amended by adding on Page 36 after the words "are remanded for a new trial" the following words, "restricted

to the issue of liability", so that the sentence as amended will read:

"The judgments in Nos. 11,991 and 11,992 are reversed and the cases are remanded for a new trial restricted to the issue of liability".

It is FURTHER ORDERED by the Court that the judgment entered herein February 8, 1955 be, and it is hereby, amended by adding in Paragraph 4, in the fifth line, after the word "trial", but before the semicolon, the words, "restricted to the issue of liability", so that said line as amended will read:

"to the said District Court with directions to award a new trial restricted to the issue of liability; and"

Per Curiam.

Dated: June 24 1955

Filed Jul 12 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Nos. 11,991 and 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Memorandum on Motion filed July 1, 1955, for Rehearing on Appellees' Motion to Clarify or to Modify Judgments.

Before Edgerton, Wilbur K. Miller and Fahy, Circuit Judges.

PER CURIAM: Pursuant to appellees' motion to clarify or to modify the judgments of reversal heretofore entered in these cases, we entered an order June 24, 1955, restricting the retrial in the United States District Court to the issue of liability.

The appellant has moved that we reconsider that order and amend it to permit the retrial of the issue as to the situs of the collision, as well as the issue of liability. The appellant argues that in our opinion of February 4, 1955, we expressly refrained from either reviewing or deciding the situs point. Eastern misconstrues our opinion in that regard. We simply said we thought it unnecessary to discuss the issue concerning the situs of the collision and the other grounds for reversal advanced by Eastern. We had considered Eastern's contention that the planes collided in Virginia, instead of in the District of Columbia as found by the jury, and had determined the jury's finding was sufficiently sustained by the evidence. We adhere to that view. Consequently the appellant's motion for rehearing concerning our order of June 24, 1955, is denied.

Dated: July 12 1955

Filed Jul 12 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991-2

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Chief Judge, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's motion for rehearing on appellees' motion to clarify and to modify judgments in the above-entitled case, it is

ORDERED by the Court that the aforesaid motion for rehearing on appellees' motion to clarify and modify judgments be, and it is hereby, denied for the reasons set forth in the memorandum of this Court filed herein this day.

Per Curiam.

Dated: July 12 1955

FILED
AUG 24 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 298.

UNION TRUST COMPANY, et al.,
Petitioners,

v.

EASTERN AIR LINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION.

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IN THE

Supreme Court of the United States.

October Term, 1955.

No. 298.

UNION TRUST COMPANY, ET AL.,
Petitioners,

v.

EASTERN AIR LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION.

OPINION BELOW.

The Opinion of the Court of Appeals is reported at 221 F. 2d 62, and is printed in Appendix A of the Government's Petition in the companion case against the Government, entitled *United States of America, Petitioner v. Union Trust Company et al.*, No. 296. There was no Opinion in the District Court.

QUESTIONS PRESENTED.

The petitioners state (pp. 2, 3) that three questions are presented in their application. It is respondent's position that none of the questions so stated is presented by the record. The Court of Appeals has merely reversed a judgment based upon a jury verdict and remanded the case for a new trial, limiting its remand to the question of liability. The remand was based primarily upon a finding by the Court of Appeals that petitioners had failed to sustain their burden of proof in the trial court. "Affirmative testimony that the Eastern plane was cleared to land was not countered by evidence sufficient to form a factual issue; hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof." (221 F. 2d 62, 72, 73; U. S. 22a) There has been no final judgment in the case.

The only question involved is whether this court should exercise its supervisory power and review a non-final judgment in which the Court of Appeals, because of errors of law committed in the trial court, reversed a judgment of the District Court entered upon a jury verdict and remanded the case for a new trial.

STATEMENT OF THE CASE.

Petitioners' statement of the case (pp. 3-12) is nothing more than an incomplete recital of some conflicting evidence. The case, as far as this Petition is concerned, may be briefly stated as follows:

In wrongful death actions against Eastern Air Lines to recover for the deaths of passengers which resulted from a mid-air collision at the Washington National Airport on November 1, 1949, between a Bolivian P-38 military plane in test flight, and an Eastern DC-4 on a regularly scheduled flight, one of the principal allegations of negligence upon the part of Eastern was that at the time of the collision its plane was in the process of landing at the airport without

proper clearance from the control tower. Upon the trial, Mr. Tigner, the Air Traffic Controller in the control tower at the airport, testified categorically that prior to the collision he had cleared the Eastern plane to land, and at the time of the collision the Eastern plane was precisely where it was supposed to be. His testimony in this respect was corroborated by other substantial evidence in the record. Petitioners, in an effort to prove the contrary, namely, that the DC-4 was not cleared to land, called Lieutenant Shaw, a co-pilot on a National Airlines plane which was in the air some minutes behind the Eastern plane. Lieutenant Shaw, among other things, testified that although the radio of his plane was tuned to the tower frequency, he did not hear on his earphones the Eastern plane cleared to land. The jury, returning answers to special interrogatories, found that Eastern was liable. On appeal, the Court of Appeals held that the purely negative testimony of Lieutenant Shaw was, on the record, insufficient to sustain the burden which rested upon the petitioners in the face of the affirmative testimony that the Eastern plane was cleared to land. The judgment of the District Court was reversed and the case remanded for a new trial on the issue of liability only. (221 F. 2d 62, 72; U. S. 22a, 23a)

There were other questions involved in Eastern's appeal to the Court of Appeals which, with the exception of the situs of the accident, that court did not pass upon in reversing the judgment of the District Court. (221 F. 2d 62, 73; U. S. 23a; App. A 6a)

Petitioners' statement of the case is replete with factual inaccuracies and inferences which are without support in the record of eleven volumes. Respondent, however, does not believe that any of those statements or inferences has any particular bearing upon the simple question presented, and, accordingly, it will not burden the court nor extend this Brief by dealing with such inaccuracies.

ARGUMENT.

No Final Judgment Has Been Entered in This Case. The Decision Below Merely Reversed a Judgment Based on a Jury Verdict for Errors of Law and Remanded the Case for a New Trial. It Was in Strict Accordance With Well-Established Rules of Appellate Review and Recognized the Exclusive Province of the Jury by Remanding the Case for a New Trial. It Did Not, as Petitioners Erroneously Assert, Rule Upon Any Question of the Credibility of Witnesses. It Did Not Depart From, or Sanction a Departure From, the Accepted and Usual Course of Judicial Proceeding.

Petitioners' argument presents the case as though the Court of Appeals had reversed the judgment and dismissed the complaint. The authorities cited by petitioners on pages 13 and 14 of the Petition are cases in which the judgment of the Court of Appeals was a *final* judgment disposing of the entire litigation. *There is no final judgment here.* The Court of Appeals did not decide that no jury question was present. Quite the contrary. It remanded the case for a new jury trial.

The reversal and the remand were the necessary legal results of a finding that an error of law had been committed by the trial court in assigning to the negative testimony of one of petitioners' witnesses a probative value which, under a well-settled rule of law, it did not possess. That rule of law is not challenged by the petitioners, as, indeed, it could not be. It is supported by decisions of the Court of Appeals for the District of Columbia, the Court of Appeals for the Sixth Circuit and by decisions of the States of Louisiana, Pennsylvania, Utah, Nevada, New York, Wisconsin and Massachusetts. (221 F. 2d 62, 72) It

is not, as petitioners assert, in conflict with the decisions of this court nor any of the other several circuits.

The unanimous opinion of the Court of Appeals in this case was in strict accordance with the well-established rules of appellate review; and petitioners' assertion that it invaded and usurped the province and function of the jury is plainly belied by the fact that the case was remanded for a new trial. Petitioners' repeated assertions that the Court of Appeals usurped the jury's function is contradicted by the principal record fact that this case has been remitted to the trial court for a jury trial on the single issue of liability. Therefore, none of the authorities cited by petitioners is apposite to the situation at bar.

The decision below did not, as petitioners erroneously assert, rule upon any question of the credibility of witnesses; nor did it rule that the testimony of any witness had to be accepted by the jury over that of any other witness. Petitioners endeavor to complicate the ruling of the Court of Appeals which was to the single effect that petitioners had failed to sustain the burden of proving that the Eastern plane had not been clear to land. ". . . hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof." (221 F. 2d 62, 73; U. S. 22a)

The Court of Appeals carefully observed the well-established rules of appellate review and did not depart from, nor sanction a departure from, the accepted and usual course of judicial proceedings.

This case is merely remanded for a new trial. It is not based upon a final judgment. The Petition before this Honorable Court does not call for the exercise of its supervisory powers.

CONCLUSION.

It is, therefore, respectfully submitted that the Petition should be denied.

Respectfully submitted,

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JAN 23 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 298

UNION TRUST COMPANY, *et al.*,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

JOSEPH W. HENDERSON,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 298

UNION TRUST COMPANY, *et al.*,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States

Your respondent, Eastern Air Lines, Inc., respectfully requests this Honorable Court to reconsider the *per curiam* decision rendered herein on December 5, 1955; and upon such reconsideration (1) to vacate the *per curiam* order, and dismiss the petition for certiorari as improvidently granted; (2) in the alternative, to vacate so much of the order as reversed the judgment below, and place the case on the calendar for briefs and oral argument on the merits; (3) in the further alternative, to remand the cause

to the United States Court of Appeals for the District of Columbia Circuit in order to permit that court to pass upon the several issues which it left undecided, and which were not presented to nor decided by this Court; and (4) in any event that the mandate of this Court be stayed pending final disposition of the matter.[1]

This Rehearing Petition is filed for the following reasons:

(1) The writ was improvidently granted in a non-final judgment case which merely involved its own facts, and which remanded the case for a new trial. There were no "special or important reasons therefor"; no questions of public interest; and no other basis for the exercise of this Court's sound discretion within, or without, Rule 19. In reversing the District Court, the Court of Appeals did *not* make any "inappropriate resolution of conflicting evidence" (*Wilkerson* v. *McCarthy*, 336 U. S. 53, 60) nor did it "reweigh" the evidence (*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29). It merely applied a well settled rule of law in the District of Columbia with respect to testimony concededly negative in form and substance; and finding substantial error, remanded the case for a new trial on the single issue of liability.

(2) On a petition, and brief in opposition, devoted *solely* to whether the Court should *review* an interlocutory, non-final, judgment directing a new trial, this Court took jurisdiction on the merits of the cause and summarily reversed the Court of Appeals, in effect reinstating a jury verdict, without affording

[1] An order extending the time for the filing of this Rehearing Petition up to and including January 25, 1956, was signed by Chief Justice Warren on December 13, 1955.

respondent an opportunity to be heard on the merits. The judgment sought to be reviewed being non-final, the brief in opposition to certiorari entered upon no extended discussion of the merits. Pursuant to the apparent mandate of Rule 24 par. 1 the brief confined itself to "disclosing any matter or ground why the cause should not be reviewed by this court".

(3) This Court, we feel, apparently believed that all issues were before it, but the certiorari petition tendered only a single issue (in three forms, Petition p. 3), viz, whether the Court of Appeals judgment was an unwarranted intrusion upon the jury's province and deprived petitioner of the right of a jury trial. The fact is that there were other important issues presented to the Court of Appeals some of which were passed upon by it, and others not, but none of which have been presented to or passed upon by this Court. These issues were:

(a) The Court of Appeals decided a major Federal question as to the application of the Administrative Procedure Act in a manner contrary to a previous decision of the Court of Appeals for the 9th Circuit. That question has not been, but should be, settled by this Court; but it was not presented to this Court in the certiorari petition.

(b) Eastern's motion to set aside the verdict on the grounds that it was based on passion, prejudice and sympathy for the Bolivian pilot was never passed upon by the Court of Appeals, nor by this Court. The jury verdict exonerated the pilot of the P-38 which *overtook* and struck down, from above and behind a commercial airliner on final approach for landing at the

Washington National Airport in the face of admissions by the Bolivian pilot *that he never saw the Eastern plane.*

(c) Eastern's motion for a new trial on the grounds that the trial of the (non-jury) Tort Claims case simultaneously with, and before the jury in the Eastern case, had resulted in prejudice and deprived Eastern of a fair trial, was never passed upon by the Court of Appeals nor by this Court.

(d) Eastern's motion to set aside the verdict for a new trial on the grounds that the constant repetition throughout the trial of unproven charges that the Government control tower witnesses had consciously "concocted and fabricated their testimony" had created a courtroom atmosphere which deprived it of a fair trial, was never passed upon by the Court of Appeals nor by this Court.

(4) The Court, we believe, inadvertently considered the judgment of the Court of Appeals, as a final judgment of dismissal. This case (No. 298) was not a case of final judgment of dismissal. It was a companion case (with a common record and joint appendix) to Nos. 296 and 297, both of which were final judgment cases under the Tort Claims Act arising out of the same accident, each presenting a single point of law, which was thoroughly briefed by the parties in their respective petitions, and briefs in opposition. In No. 296, the Court granted certiorari and affirmed on the authority of *Indian Towing Co.* v. *U. S.*, 350 U. S. 61, decided Nov. 21, 1955. No. 297 raised the sole question of which state death statute (Virginia

or District of Columbia) was applicable under the Tort Claims Act and the Court denied certiorari. Respondent believes that the close association of this *non-final* judgment case (No. 298) with the *final judgment* Tort Claims Act cases may well have caused this Court to consider the judgment in No. 298 as final.

Statement of the Case on Rehearing

At 11:46 a. m. on November 1, 1949, a clear bright day, an Eastern Air Line DC-4 passenger transport plane, on a regularly scheduled flight, with 51 passengers and a crew of 4 was about to land on runway No. 3 at the Washington National Airport. It was on final approach and 300 feet from the ground when it was struck from *above* and *behind* by a high speed P-38 military plane owned by the government of Bolivia and operated by Eric Rios Bridoux, a Bolivian army pilot. The left propeller of the P-38 cut through the fuselage of the DC-4 just aft of the wings, cutting the DC-4 in two. All aboard the Eastern plane were killed. Bridoux, the only survivor of the disaster, admitted from the witness stand that he was flying by dead reckoning and that the visual obstructions (blind spots) of the P-38 cockpit so limited his vision that he never saw the plane which he struck down. The structural expert of the Civil Aeronautics Board found that the landing gear of the P-38 had crashed through the roof of the DC-4, leaving red paint marks from the belly tanks of the P-38 on the top of the fuselage of the DC-4.

Numerous Tort Claims suits were brought against the Government on the grounds that the air traffic controllers in the airport control tower had failed in their

duty to separate the planes and to advise each of the proximity of the other. Other death actions were brought against Eastern Air Line and Bridoux. The main allegation of negligence against Eastern was a claim that the DC-4 did not follow through in the traffic, or landing pattern of the Washington National Airport. Two cases were selected for trial on the issues of (1) liability and (2) locus of the accident viz., whether the collision occurred in Virginia (death limit $15,000) or in the District of Columbia (recovery for death unlimited). Following *U. S.* v. *Yellow Cab Co.*, 340 U. S. 543 the non-jury Tort Claims Act cases were tried to the District Judge simultaneously with, and in the presence of, the jury to which the cases against Eastern and Bridoux were tried.

In his opening statement to the jury, petitioners' counsel conceded that the Eastern plane had been cleared to land (I-62A, 63A), and no claim that Eastern was landing without clearance was advanced in the pleadings or in the pretrial order (I-21A, 22A). However, after Mr. Dallas W. Rentzel, Administrator of Civil Aeronautics (called as a court witness) testified that a plane "cleared to land" by the tower need not follow through in the landing pattern, but may land immediately, petitioners sought to create an issue of fact as to the existence of a landing clearance by the negative testimony of Lt. Shaw that *he did not hear* the Eastern plane cleared to land. The Washington National Airport landing pattern was admitted into evidence over Eastern's objection and the court charged the jury that it constituted a binding Federal regulation, breach of which would be negligence *per se*. Eastern's objection was based on the undisputed fact that the pattern was

not adopted in conformity with the Administrative Procedure Act, and was never published in the Federal Register.

Answering framed interrogatories the jury exonerated Bridoux, found Eastern liable, and found the collision occurred in the District of Columbia.

Eastern's new trial motion (denied) was based principally on (1) the error in admitting the landing pattern, and the instruction that it was a binding Federal regulation, etc. (2) that the verdict was contrary to the evidence, and based on passion, prejudice and sympathy for the Bolivian pilot (3) that Eastern had been deprived of a fair trial by the repeated (and concededly unproven) charges, made in the jury's presence, that the Government control tower witnesses had consciously "concocted" and "fabricated" their testimony (4) that the trial of the non-jury Tort Claims case, before the jury in the Eastern case, had cast grave prejudice upon Eastern, and deprived it of a fair trial.

In its judgment (221 F. 2d 62) the Court of Appeals ruled (1) that the Landing Pattern constituted a binding Federal regulation notwithstanding failure to follow the adoption procedures specified in the Administrative Procedure Act, 5 U. S. C. 1001 et seq. (2) that because the only testimony adduced by petitioner to prove Eastern was not cleared to land, was the mere *negative* testimony of one, not in a position to hear at all times, that *he did not hear* a landing clearance given, under the local law of the District of Columbia (*Small* v. *Penn. RR*, 80 F. 2d 704) petitioners had not sustained their burden of proof since there was *affirmative, positive*, testimony (whether it

be believed or not) that a landing clearance was given. The Court of Appeals (on a motion to clarify and modify, Appendix A of Petition) affirmed the jury verdict that the locus of the collision was in the District of Columbia, *and remanded the case for a new trial on the issue of liability only.*

I

The writ was improvidently granted in a "non-final" judgment negligence case involving only its own facts, and which merely remanded the cause for a new trial. There were no "special and important reasons therefor" no questions of public interest. Far from depriving petitioners of a jury trial, the judgment below defended such right by ordering a new jury trial. The grant of certiorari was contrary to the standards of certiorari policy and procedure previously announced by this Court.

As far as concerned the law suit against Eastern Air Lines (No. 298) the case was an *ordinary negligence* action against an air carrier arising out of a collision between two airplanes. It involved only its own particular facts. The *per curiam* order of the Court granted certiorari and summarily reversed the Court of Appeals in a case where the reversal below rested solely on whether *under the local law of the District of Columbia* there was sufficient evidence to take to the jury the issue whether the Eastern Air Lines' plane in its approach for landing at the Washington National Airport was attempting to land without clearance or permission from the control tower.

It is a patent fact, on the face of a clear record, that none of the "Questions Presented" (Petition pp. 2-3) as set forth in the Petition for Certiorari is, in fact, presented by the record; and the brief in opposition so stated. (Brief in opposition, p. 2)

While No. 298 was closely related to Nos. 296 and 297, both by a common fact situation and the same Joint Appendix, No. 298 was a simple negligence case, with *none* of the special and important questions as to the applicability of the Tort Claims Act, or as to what state law is applicable under that Act, which were presented in Nos. 296 and 297. It was, indeed, unfortunate for this respondent, that its case was tied to No. 296 and No. 297, by a common Joint Appendix. In its non-final judgment, remanding the case for a new trial, the Court of Appeals in No. 298 did not base its reversal on any federal question (although it did decide a federal question in favor of petitioners, viz., the landing pattern, contrary to the Ninth Circuit in *Hotch* v. *U. S.*, 212 Fed. 2nd 280); nor was its decision remanding the case in conflict with any decision of this Court, nor of any other Court of Appeals. It merely decided a "matter purely of local law" in the District of Columbia, *D. of C.* v. *Pace*, 320 U. S. 698, 702; *Griffin* v. *U. S.*, 336 U. S. 704, 717-718.

The certiorari petition (pp. 2-3) tendered, as a reason for review by this Court, a single question, whether the judgment of the Court of Appeals "constituted an unwarranted intrusion into the jury's exclusive province and a deprivation of the constitutional right to a jury trial". Although presented in three different forms (Petition p. 3), this was the

single question urged, as appears from page 5 of t
petition where it is stated:

> "This petition is largely grounded on the nec
> sity of this Court's exercising its supervis
> jurisdiction to avoid emasculation of the c
> stitutional right to jury trial under the guise
> appellate review as to the legal sufficiency of t
> evidence where that review usurps the jur
> sole prerogative of evaluating questions of cre
> bility and the relative weight and force of c
> flicting evidence and inferences."

Respondent's brief in opposition met that propo
tion by pointing out that in truth and in fact t
Court of Appeals did not, as petitioners erroneou
asserted, pass upon questions of credibility, or c
flicting testimony; nor did it, as the petition repeate
asserts, hold that the jury was required to acce
"the version of the control tower operator as a matt
of law". The opinion of the Court of Appeals mer
applied a rule of law, well settled in the District
Columbia and in other jurisdictions,[2] to the effect th

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[2] *Seregos* v. *C. W. Good Inc.*, 3rd Cir., 1952, 193 F. 2d 741
Small v. *Pennsylvania R. Co.*, 1935, 65 App. D. C. 1
80 F. 2d 704;
Strider v. *Pennsylvania R. Co.*, 6 Cir., 1932, 60 F. 2d 237
Venchik v. *Pennsylvania R. Co.*, 1941, 143 Pa. Super. 4
18 A. 2d 118;
Lanier v. *Missouri P. R. Co.*, 1929, 9 La. App. 586, 119
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Zotter v. *Lehigh Valley R. Co.*, 1924, 280 Pa. 14, 124 A. 2
Jensen v. *Oregon Short Line R. Co.*, 1922, 59 Utah 367,
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Rickert v. *Union P. R. Co.*, 1916, 100 Neb. 304, 160 N. W.
Young v. *Erie R. Co.*, 1913, 158 App. Div. 14, 143 N. Y.
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Jordan v. *Osborne*, 1911, 147 Wis. 623, 133 N. W. 32;
Hubbard v. *Boston & A. R. Co.*, 1893, 159 Mass. 320, 34 N.
459.

if there be positive, affirmative, evidence that a sound or signal was made or given, then mere *negative* testimony by a witness that he did not hear such sound or signal has little or no probative value if it appears that the witness was not at all times in a position to hear, or that he was not at all times attentive. We analyze the Court of Appeals holding in further detail under Point III *infra*.

That is the sole and simple import of the judgment of the Court of Appeals reversing this jury verdict. The Court of Appeals did not make any "inappropriate resolution of conflicting testimony", an appellate practice identified and condemned in Mr. Justice Black's opinion in the FELA case, *Wilkerson* v. *McCarthy*, 336 U. S. 53, 60. The certiorari petition, by repeated distortions of the Court of Appeals holding, sought, we believe, to convey to this Court the impression that the Court of Appeals had made an "inappropriate resolution of conflicting testimony", and based thereon had rejected the jury verdict, and granted judgment n.o.v. to defendant. Indeed the whole petition was written as though the Court of Appeals judgment had been a *final judgment of dismissal*, depriving petitioners of their right of trial by jury—as though the Court of Appeals ruled as a matter of law that the jury "must accept" the testimony of the control tower operator (Petition pp. 3, 4, 5, 6, etc.).

The heading on page 12 of the petition that the Court of Appeals' decision "is a shocking invasion of the jury's function, a gross impairment of the right to trial by jury and contrary to standards for judicial review long established by this Court" is

such an obvious distortion of the record that respondent felt it unnecessary to deal with it in its brief in opposition. It seemed so clear as to require no more than a single line of comment, since the judgment sought to be reviewed was a non-final interlocutory remand for a new jury trial (leaving numerous other issues undecided). Later herein the Court's attention will be directed in detail to the petition's misstatements of the record, and to the issues which the decision of the Court of Appeals, and the order of this Court, leave undecided.

It is the settled practice of this court *not* to grant certiorari in non-final judgment cases, unless (in addition to "the special and important reasons therefor") there are extraordinary and exceptional circumstances requiring it for the further conduct of the case.

> *American Construction Co.* v. *Jacksonville T & K R. Co.*, 148 U. S. 372, 384;
> *The Conquerer*, 166 U. S. 110, 113;
> *U. S.* v. *Gen. Motors*, 323 U. S. 373, 377;
> *Land* v. *Dollar*, 330 U. S. 731, 734;
> *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685.

Respondent has not been able to find any civil jury case in which this Court, after an opposing brief had been filed, granted certiorari and simultaneously reversed a non-final judgment which had merely reversed a jury verdict and ordered a new trial. *Thibaut* v. *Car & General Ins. Corp.*, 332 U. S. 751 might *appear* to be such a case, but there *no brief in opposition* to the petition was filed; and even in that case this Court granted a rehearing and dismissed the writ as improvidently granted, 332 U. S. 828.

We carefully distinguish the case at bar from FELA, Jones Act, and similar cases in which, (a) after a jury verdict for the plaintiff, the District Court or the Court of Appeals had *set aside the verdict and given judgment for the defendant as a matter of law*; or (b) dismissed the complaint for failure to state a claim and entered judgment for defendant. In some such cases this Court has granted certiorari and simultaneously reversed upon the certiorari petition; sometimes with, and sometimes without, a brief in opposition.[3] In each such case, however, the Court was dealing with a *final* judgment. In each it could be soundly argued that the dismissal *as a matter of law* had constituted an "invasion of the jury's function" (just as the petition in the case at bar argued).

That situation did not exist in No. 298, and respondent relied upon the well settled rule of the certiorari policy and procedure, that this Court would not review a non-final judgment unless there are excep-

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[3] In *Cantey* v. *McLain Line*, 114 F. 2d 1017, the Second Circuit Court of Appeals affirmed the dismissal of a libel brought under the Jones Act, on grounds that libellant was not a member of the crew of a vessel—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 312 U. S. 667. *Respondent appeared* in opposition to the certiorari petition.

In *Rogers* v. *U. S. Lines*, 205 F. 2d 57, the Court of Appeals for the Third Circuit affirmed the district court's judgment granting the vessel owner judgment n.o.v. in a longshoreman's suit—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 347 U. S. 984, citing its earlier decision in *Alaska SS Co.* v. *Peterson*, 347 U. S. 396. *Respondent appeared in opposition.*

In *Gianfala* v. *Texas Company*, 222 F. 2d 382 the Court of Appeals for the 5th Circuit set aside a jury verdict and dismissed the complaint on the grounds that, as a matter of law, plaintiff was not a seaman under the Jones Act. This Court granted certiorari and simultaneously reversed in a *per curiam* order, 350 U. S. 879. *Respondent did not appear.*

In *Lillie* v. *Thompson*, 162 F. 2d 716, an FELA case, the

tional and extraordinary circumstances, which are not presented here—especially a case which involved only its own particular facts, and where the judgment left several litigated issues undecided.

Based upon these decided cases and upon the rules of this Court it has, we believe, been the understanding of text writers, and of the bar, that certiorari would not be granted in a non-final judgment case of the character of that at bar. See, e. g., Stern & Gressman, Supreme Court Practice, Second Edition, 1954, p. 130; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 1951, Section 130; Hart & Wechsler, The Federal Courts and the Federal System, 1953, p. 1394.

Even if this case otherwise qualified for certiorari, its posture, when the petition for certiorari was filed,

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Sixth Circuit Court of Appeals affirmed the dismissal of a complaint for failure to state a cause of action under the Act—a final judgment. This Court granted certiorari and simultaneously reversed in a *per curiam* decision, 332 U. S. 459. *Respondent did not appear.*

In the following FELA cases the *per curiam* orders granting certiorari, and simultaneously reversing, were all in *final judgment* cases, where a jury verdict for plaintiff had been set aside and judgment directed for the railroad:

Smalls v. *Atlantic Coast Line R. Co.*, 216 F. 2d 842 (4th Cir.), 348 U. S. 946—no appearance for respondent. Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Minton dissented. Rehearing denied, 349 U. S. 907.

Anderson v. *Atlantic Coast Line R. Co.*, 221 F. 2d 548 (5th Cir.), 350 U. S. 807 (No. 143 Oct. Term 1955). Respondent appeared. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan were of the view that certiorari should not be granted. Rehearing denied, 350 U. S. 905.

Cahill v. *N. Y. N. H. & H. R. Co.*, 224 F. 2d 637 (2nd Cir.), 350 U. S. 898. Respondent appeared. Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan were of the view that certiorari should have been denied. Mr.

was one in which it was clearly "not appropriate for adjudication" *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 79; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. The Court of Appeals had merely ruled that under the settled law of the District of Columbia (citing *Small* v. *Penn. R. R. Co.*, 80 F. 2d 704) petitioners had failed to sustain the burden of proof on one important issue. It, therefore, remanded the case for a new trial in order to permit petitioners to sustain that burden if it could. Clearly, therefore, the case was not "ripe for adjudication" by this court. Although *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, dealt with a federal question, the language of this court's opinion is peculiarly apposite:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly con-

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Justice Reed was of like view, and dissented from the judgment of reversal. Rehearing denied on January 9, 1956.

Strickland v. *Seaboard Air Line R. Co.* (No. 425 Oct. Term 1955), 80 So. 2d 914 (Sup. Ct. Florida), 350 U. S. 893. Respondent appeared. Certiorari granted and judgment unanimously reversed in a *per curiam* order on authority of *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350.

The following cases were not FELA, nor Jones Act, but both were *final judgment* cases in which the jury verdict for plaintiff had been set aside, and judgment directed for defendant:

Williams v. *Carolina Life Ins. Co.*, 210 F. 2d 477 (5th Cir.). Suit on an accident policy. Certiorari granted and simultaneously reversed 348 U. S. 802. Unanimous court. No appearance for respondent. Rehearing denied, 348 U. S. 889.

Swafford v. *Atlantic Coast Line R. Co.* (No. 261 Oct. Term 1955), 220 F. 2d 901 (5th Cir.). Grade crossing accident. Certiorari granted and simultaneously reversed, 350 U. S. 807 in the same *per curiam* order as the FELA case, *Anderson* v. *Atl. Coast Line R. Co.*, 350 U. S. 807. Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Harlan felt that certiorari should not granted. Rehearing denied, 350 U. S. 898.

sidered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." (p. 74)

"Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." (p. 77)

We respectfully submit that for the reasons stated, the rule of *Wilkerson* v. *McCarthy*, 336 U. S. 53 is not applicable to the case at bar; and that this Court should follow its decision in *Thibaut* v. *Car & General Ins. Corp.*, 332 U. S. 828; grant rehearing, vacate the order entered herein on December 5, 1955, and dismiss the writ as improvidently granted.

II

The petition for certiorari and brief in opposition were devoted solely to the preliminary question whether this Court should review the judgment below. The summary reversal of the judgment, simultaneous with the granting of certiorari, has operated to deprive respondent of an opportunity to be heard on the merits.

Although the petition for certiorari was written as though the court below had granted judgment n. o. v. to respondent[4] neither in its "Questions Presented", in its "Reasons for Granting the Writ", nor in its "Conclusion" did the petition for certiorari pray for a summary reversal of the non-final judgment of the Court of Appeals. Fairly read, the sole contention of the petition was that this Court should exercise its supervisory jurisdiction and grant review in a case in which, petitioners claimed, the *remand* for a new trial amounted to a deprivation of its right of trial by jury. Turning to the brief in opposition filed by respondent, the attention of the Court is first directed to the fact that Rule 24, paragraph 1 prescribes "an opposing brief disclosing any matter or ground why

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4 Every case cited in the petition as authority for the proposition that the ruling below was an invasion of plaintiff's right of trial by jury is either an affirmance of a jury verdict, or a case in which the Court of Appeals reversed a jury verdict, and dismissed, or granted judgment n.o.v. See *Jacob* v. *The City of New York*, 315 U. S. 752; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29; *Lavender* v. *Kurn*, 327 U. S. 645 and *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184 cited on pages 13-15 of the certiorari petition. The latter were cases in which the Court of Appeals reversed the jury verdict and dismissed the complaint.

the cause *should not be reviewed by this court*. See Rule 19" (our italics). Rule 19 is entitled "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI". Because the arguments of the petition were all devoted to the contention that this Court should review the case, and following the apparent mandate of Rule 24, paragraph 1, respondent's brief in opposition confined itself to the letter of Rule 24. It expressly refrained from arguing the merits of the cause, and devoted its arguments solely to the question of whether on this non-final judgment of remand, a proper case for the granting of certiorari under Rule 19 was made out. There are numerous expressions of the Court on that subject. In this regard the brief in opposition was guided by the admonitions of the late Chief Justice Hughes in his letter of March 21, 1937, to Senator Burton K. Wheeler; as well as by the remarks of the late Chief Justice Vinson in his address on the "Work of the Federal Courts" to the American Bar Association on September 7, 1949; as well as by the views of the numerous text writers who have admonished that respondent's counsel should remember that he is seeking to induce the Court to deny a petition for certiorari, not to win a case on the merits.

The brief in opposition called the Court's attention specifically to the fact that petitioners' statement of the case was replete with factual inaccuracies and inferences without support in the record (Brief in Op. p. 3). Having done so, the opposing brief pointed out that those inaccuracies did not have any bearing on the single issue presented, viz., whether this Court should review a non-final judgment of the Court of Appeals remanding the case for a new jury trial.

However, since the Court entered its *per curiam* order on the petition as filed, the inaccuracies contained therein are dealt with at length later herein.

Based solely on such a petition, and brief in opposition, and without benefit of oral argument or briefing on the merits, this Court granted certiorari and, simultaneously therewith, summarily reversed the judgment of the Court of Appeals.

Respondent respectfully urges this Court to reconsider its *per curiam* order of December 5, 1955; and upon such reconsideration to vacate such order and dismiss the writ as improvidently granted. In any event, respondent earnestly urges upon the Court that the manner in which the merits of this case were decided has operated to deprive respondent of a most fundamental right, to wit, the opportunity to be heard on the merits, and upon the other issues expressly left undecided by the Court of Appeals, and not presented to this Court. If the writ of certiorari is not to be dismissed as improvidently granted, the *per curiam* order should be modified so as to vacate so much thereof as reverses the judgment of the Court of Appeals, and the cause restored to the calendar of this Court for briefs and oral argument on the merits of all issues.

III

In reaching its *per curiam* decision we believe this Court may have been misled by the numerous misstatements in the petition as to the rulings of the Court of Appeals and as to the evidence. Petitioners' statement of the case misstated the record in many particulars.

(a)

Misstatements as to the Ruling of the Court of Appeals

The following are quotations from the petition in which the rulings of the Court of Appeals are misstated:

> "* * * the court below concluded that the trial judge erred * * * in not accepting the version of the control tower operator as a matter of law, * * *" (p. 3)

> "whether * * * an appellate court can * * * direct the jury as a matter of law to accept the version of" a witness (Tigner) (p. 3)

> "The court below *assumed* Tigner's credibility (and that the jury was *required* to believe him)" (p. 6)

> "* * * the court has in effect ruled as a matter of law that Tigner told the truth * * * and that the jury was *required* to accept that statement as truth." (pp. 16-17)

> "* * * an appellate court here (the court below) states that as a matter of law he (Shaw) must have been mistaken." (p. 18)

"The Court of Appeals Erroneously Concluded That the Jury Must Accept the Uncontradicted Testimony of A Witness * * *" (p. 21, heading)

"* * * the court below held that the jury was bound to accept Tigner's word, that a jury is required to believe the uncontradicted assertion of an interested witness * * *" (p. 21)

Each of these quoted statements is untrue. Each is so patently untrue that individual pinpointing did not seem necessary, nor appropriate, in the brief in opposition.

A mere reading of the opinion of the Court of Appeals (221 F. 2d 62) demonstrates the untruth of each statement. That court did *not* rule on any question of the *credibility* or *veracity* of Tigner, or any other witness. It did *not* rule that *"the jury must accept"* the testimony of Tigner or any other witness. It did *not apply, nor* even *mention,* the "uncontradicted testimony rule" to which pages 21 through 26 of the petition devote a detailed discussion. If the Court of Appeals had reversed and granted judgment n.o.v. those statements would, on this record, be proper and true. However where the Court of Appeals, for the reasons it has stated, has remanded for a new jury trial, such assertions are obvious distortions of the record.

We respectfully ask this Court to consider for a moment exactly what the Court of Appeals decided in the judgment below (apart from its ruling in favor of petitioners that the larding pattern constituted a binding Federal Regulation notwithstanding the contrary view of the Ninth Circuit in *Hotch* v.

U. S., 212 F. 2d 280): In order to establish, *prima facie,* that the Eastern plane in its landing approach left the Washington National Airport traffic pattern without control tower authority, and thus became *per se* negligent by violating a Federal Regulation, petitioners had to prove that the Eastern DC-4 had *not* been *cleared to land* by the tower (because the District Judge instructed the jury as a matter of law that a plane "cleared to land" was authorized to leave the traffic pattern and land immediately). Petioners had the burden of proof. In its effort to prove the tower had given no landing clearance, petitioners presented Lt. Shaw, the co-pilot of a National Airline plane which was some minutes behind the Eastern plane, who testified that while tuned to the tower frequency, *he did not hear* Eastern cleared to land. The parties had *stipulated* in the pre-trial order (I-22A) that the Eastern plane's radio was tuned to the tower frequency (119.1 megacycles) as early as 11:38 a. m. Lt. Shaw conceded his plane did not get on that frequency until 11:42 or 11:43 a. m. Thus if the clearance was given in the 4 or 5 minutes between 11:38 and 11:42-11:43 Shaw could not have heard it.

It is a conceded fact that when Shaw's plane transmitted to the tower on its radio, its reception was muted, and the landing clearance, if given to Eastern during that time, could not be heard (I-111A, 112A; II-249A).

It was a conceded fact that Lt. Shaw (although he said he had earphones on during the critical 3 or 4 minute period) was *not operating the radio, nor responsible for its operation. He was flying the airplane.* His pilot, Captain Porter, was handling the

radio. Shaw was engaged in the all consuming task, and manifold duties, of bringing a large commercial transport plane into one of the busiest airports in the world.

Shaw's testimony as to the landing clearance was concededly negative in form—that he did not hear Eastern cleared to land (I-92A).

Opposed to Shaw's testimony was (1) The repeated statements by the control tower operator, Tigner, that he, personally, had cleared Eastern to land; and that the Eastern plane was exactly where it should have been when it was struck by the Bolivian (2) Captain Ator's unequivocal statement that, while waiting for permission to take off on the runway then in use, he was *told by the tower* that he "could take position behind the landing DC-4" which he had already heard make radio contact, (V-885-A) and (3) the wealth of testimony by Colonel McGovern and many others (hereinafter referred to) that the Eastern plane was making a *normal routine landing.*

It has been the settled law in the District of Columbia, at least since 1935, when *Small* v. *Pennsylvania R. Co.,* 80 F. 2d 704 was decided, that if there be *affirmative* evidence that a sound was made, or a signal given, mere *negative* evidence that a witness did not hear the sound or signal is not sufficient to sustain the burden of proof, and raise a jury question, unless it *also* appears that the negative testimony witness was in a position to hear at all material times, and his attention was not distracted. The same rule exists in the Third and Sixth Circuits, *Strider* v. *Penn. R. Co.,* 6th Cir., 60 F. 2d 237; *Seregos* v. *C. W. Good Inc.,* 3rd Cir., 193 F. 2d 741; and in

some seven states (See cases cited in the opinion belo
221 F 2d 62, 72). *That rule was not disputed by t*
petitioners in the Court of Appeals.

Such being the applicable local law, all the court b
low did was to make such analysis of the evidence
was necessary to determine whether that well esta
lished rule applied to Shaw's testimony, the latt
being concededly negative in form and substance.

In so doing the court below did *not* rule, as t
petition erroneously states, on Tigner's *credibility*
veracity. It did *not* rule that the jury had to acce
Tigner's testimony. It did *not* "reweigh the ev
dence" as was done in *Tennant* v. *Peoria & P. V. R*
Co., 321 U. S. 29. It made no independent resol
tion of conflicting testimony as was done in *Wilke*
son v. *McCarthy,* 336 U. S. 53, 55. All it did was ru
that Tigner's testimony was *affirmative* and *positi*
(regardless of whether it is believed); that Shaw's te
timony was *negative;* that because Shaw's radio wa
not tuned to the tower frequency the whole tim
because his radio could not hear tower transmissio
while it was transmitting on the same frequency
because Shaw had no responsibility for the radi
but was occupied with the manifold duties of flyi
the plane, his mere negative testimony did not sustai
the burden of proof on that issue.

The court therefore remanded the case for a ne
trial to give petitioners another opportunity to me
that burden, if they could.

Thus we say that the petition misstated the actio
and ruling of the Court of Appeals. This Cour
we believe, may have been misled by those misstat

ments. Re-hearing should be granted. The *per curiam* order should be vacated, and the writ dismissed as improvidently granted.

(b)

Misstatements as to the Evidence

The following are quotations from the Petition for Certiorari in which the evidence is misstated:

Statement in Petition:

> "* * * petitioners claimed that Eastern was concurrently responsible for the crash by reason of several acts of negligence by its pilots including *inter alia*, attempting to land without clearance from the Control Tower. (See pre-trial order IR. 21-26; see also jury charge at XR. 2107 et seq.)" (p. 4)

Neither the complaint nor the pre-trial order (I-21-26A) contains such a charge of negligence nor did petitioners' counsel make such a claim. In fact, on at least three occasions during his opening statement, petitioners' counsel declared that respondent's plane had been *cleared to land*. (I-62A, 63A) Additionally, in the case against the United States, the Trial Court, in holding that the Government was negligent, *found as a fact* that respondent's plane was *cleared to land*. (I-44A)

Statement in Petition:

> "[3] There was not one scintilla of evidence corroborating Tigner's story that he cleared Eastern. None of the other men in the control tower could

> confirm Tigner as to the alleged clearance (VII R. 1562, VIII R. 1575, 1549) although they were not very busy at the time. (VII R. 1394, 1409) and, strangely enough, claim to have heard the other alleged transmissions between Tigner and the P-38." (p. 6, footnote 3)

The testimony of two of the tower operators corroborated Tigner. Mr. Davis testified (VII-1562A) that he heard Tigner tell the P-38 (on the military frequency which could not be heard by Eastern) to make a 360 degree turn to his left and follow the DC-4 ahead and below him. Mr. Union (VIII-1615A) likewise heard Tigner give the same instruction. Clearance to land to Eastern was a routine matter. The initial instructions to the P-38 became emergency orders when the P-38 failed to follow them. This fact is corroborated by Sgt. Buckwalter, control tower operator at Bolling Field, who overheard part of the Washington Tower-P-38 communications. (V-902A, 906A).

The testimony of Captain Ator, a Senior Pilot with American Airlines (V-884A) fully corroborated Tigner. His plane was located at the end of the landing runway awaiting clearance to take off (V-884A). Captain Ator testified:

> "A. And he [Captain Anderson, the other pilot of the American Airlines' plane] had called for instructions, which we always do, and we were informed that we could take position behind the landing DC-4 which we had already heard contact in there, and there was an Eastern that was coming in, in fact, I believe ground control informed us that it was behind an Eastern DC-4.

"Q. In other words, you were to take off behind an Eastern DC-4? A. That is right." (V-885A)

Captain Ator further testified that the Eastern DC-4 was lined up with the runway and coming directly in (V-886A) and at the time of the collision was approximately at an altitude of 300 feet. (V-886A)

Additional corroborative evidence arises from the physical facts of the accident. Many witnesses establish without contradiction that the DC-4 was on final approach for Runway 3 and was coming in for a *normal routine landing.* It was stipulated by the parties that the Eastern DC-4 was on final approach for landing on Runway 3 (I-21A) when it was struck by the P-38; from above and behind. (Ihrig, II-292A, 293A, 299A, 300A, 307A; McGovern, II-356A, 357A, 358A, diagram 358A; Mindel, III-480A, 481A, statement 485A; Cope, IV-713A; Union, IV-730A, 731A, 746A, 753A, 754A, VIII-1631A, 1640A; Ator, V-886A; Pahl, V-1008A, 1012A; Lowery, VI-1157A, 1164A, 1165A; Tigner, VI-1287A, 1313A; Aubin, IX-1793A) There is also the testimony of many witnesses who, from vantage points in the Potomac yards, the Mount Vernon Memorial Highway, or in that vicinity, which gave them excellent points of observation and whose years of experience gave them a peculiar knowledge and education in the manner in which planes approach Runway 3 for landing. Each of these witnesses, without contradiction, testified that the DC-4 was making a normal approach for landing, using as their guide (except in the case of Mr. Mindel, who is an aircraft expert and who also so testified) the fact that

they had seen many other planes previously making exactly such an approach. (Mindel, III-480A; Tesh, VIII-1748A, 1749A; Lowery, VI-1161A; Heislup, VI-1207A; Green, VI-1130A, 1131A; Ihrig, II-306A; Williams, VI-1244A; Hester, VI-1098A)

Additionally, Colonel Marshall McGovern, a Senior Pilot in the United States Air Force with vast flying experience testified (II-350A) that the DC-4 was making a normal air transport approach to Runway 3. Colonel McGovern had a clear view of the DC-4's approach from an excellent vantage point at Bolling Field, which is directly across the Potomac River from Washington National Airport. (II-350A, 351A) The Colonel testified, *inter alia*:

> "Q. Colonel, when you first saw the DC-4 plane, will you tell us whether or not it was making a normal approach to the airport similar to one that you had observed planes making on many occasions prior to this occasion? A. From my observation or my point of observation, the Eastern C-54 [DC-4] made a normal airline approach." (II-358A)

Statement in Petition:

> "That company frequency (like any other frequency) is in effect a party line and transmissions thereon can only be heard by planes tuned to that party line. * * * and ATC then directs the plane to switch over to the control tower, whereupon the plane again rotates its radio selector switch in order to cut in on the separate and distinct radio channel or party line for communication

with the control tower (119.1 megacycles)". (pp. 7-8)

The party line telephone analogy is deceptive. It is a conceded fact that while a plane is transmitting on a given frequency, it cannot receive (hear) a transmission from the tower on the same frequency. (I-112A, II-249A) It is hardly necessary to note that such a condition does not exist on a party line telephone. Speaking into a party line telephone (transmitting) does not mute its reception.

Statement in Petition:

"* * * the Shaw testimony is impressively different from that purportedly summarized in the opinion below." (p. 8)

The fact is that the Court of Appeals fairly summarized Shaw's testimony. Petitioner's treatment of Shaw's testimony on page 8 of the petition conveniently omits all reference to *time*. Lt. Shaw fixed the time his plane was over Beltsville and first tuned the tower at 11:41-42 a.m. (I-81 to 84A). The parties solemnly stipulated in the pre-trial order that the Eastern plane was over Beltsville and switched to tower frequency at 11:38 a.m. (I-22A)—about 3 or 4 minutes earlier than Shaw. The stipulation was solidly grounded on the documentary evidence (See Eastern Ex. 9, the time records, XI-2161A-3 as explained by Roerig's testimony at IX-1915A).

Statement in Petition:

"Shaw's testimony continued to show unequivocably: (1) that from the time the Eastern DC-4 and his plane first switched to the tower fre-

quency, Shaw's plane continued to be tuned to that frequency (I R. 85, 90, 92, 99, 117, 140); * * *" (pp. 8-9)

That statement is incorrect. It is flatly refuted by (1) Shaw's own testimony that he was not tuned to tower frequency until 11:41-11:42, and (2) by the stipulated and documentary fact that Eastern was tuned to tower frequency at 11:38.

Statement in Petition:

"(5) That there was nothing to distract Shaw's attentiveness to radio messages (such as log entries to make (I R. 124));" (p. 9)

That statement is demonstrably incorrect. Shaw was *flying the airplane*—operating the controls—bringing her in for a landing—occupied with the manifold duties and responsibilities which such an engrossing task entailed. It was his colleague, Capt. Porter, who was handling the radio, and thus charged with the duty of listening and petitioners did not call him as a witness. To say that there was "nothing to distract Shaw's attentiveness" is little short of the fantastic. Shaw did not so testify. When asked about a transmission from the tower he admitted he heard something which did not "register". The petition (p. 9) incompletely quoted his answer to this question. His entire answer shows he was "inattentive" rather than "attentive". It was:

"And they said 'Eastern, traffic, a P-38'. And at that point he gave them a direction; *but the direction didn't register.*" (I-90A our emphasis)

On that same page of the record Lt. Shaw emphasized his inattentiveness:

> "I didn't hear—I do not recollect if Eastern acknowledged for the traffic or not. It doesn't stick in my mind." (I-90A)

Statement in Petition:

> "7 The court below supported its argument largely on the basis of time discrepancies. * * * the only factor showing possible error in that regard is the pre-trial stipulation between counsel that Eastern was cleared into the pattern at 11:37 whereas Shaw indicated it was about 11:41-1143. * * * is Shaw not to be believed because counsel may have blundered in making a pre-trial stipulation prior to a full exploration of the facts?" (p. 10, footnote 7)

In respect of this statement it should first be said that the court below made no "argument". It merely tested Shaw's *negative testimony* by the rule of *Small* v. *Penn. R. R. Co.,* 80 F. 2d 704, to determine if he was at all times in a position to hear. In so doing, a comparison of the time as testified by Shaw, with those stipulated by the parties, was the only rational basis for determining whether Shaw could tell the *whole* story. The time discrepancies immediately demonstrated that he could not.

Petitioners intimate that they "blundered" into the stipulation that Eastern was cleared into the traffic pattern at 11:37-11:38 a.m. There was no blunder. Petitioners had taken thousands of pages of testimony and knew the precise facts before that stipulation was entered into. Petitioners also knew the

documentary fact set forth in Eastern Ex. 9 (XI-2161A-3) that the company time record (made *ante litem motam*) (showed that the Eastern plane switched to the tower at 11:38 a.m. when it was over Beltsville.

Appendix B of the petition purports to set forth a minute analysis of Tigner's testimony. We have checked it carefully, point by point, against the record and we find it inaccurate in many particulars with which we need not now burden the Court. Even if accurate, such a tabulated comparison would have been helpful only if the Court of Appeals had passed upon the *credibility* and *veracity* of the witnesses and the *weight* of the evidence and granted judgment to Eastern; but such was not the case here. As pointed out above the only purpose of the examination of the evidence by the Court of Appeals in the judgment below was to test Shaw's negative testimony by the rule of *Small* v. *Penn. R. R.*, 80 F. 2d 704. The only characterization of the Tigner testimony made by the Court of Appeals is that it was *affirmative* and *positive*. It seems unnecessary therefore to deal in detail with the numerous misstatements contained in Appendix B to the petition.

IV

The writ was improvidently granted for the further reason that, in view of the new trial ordered, the Court of Appeals judgment expressly left major issues undecided. It did not pass upon other grounds for a new trial urged by Eastern. As to such issues the *per curiam* order of reversal has the effect of depriving respondent of its statutory right of appeal from the judgment of the District Court.

In the judgment below the Court of Appeals decided three points on Eastern's appeal. The opinion reported in 221 F. 2d 62 records two of those points viz, (1) that although not published in the Federal Register, the Washington National Airport landing pattern is a binding Federal regulation, breach of which constitutes negligence *per se* (221 F. 2d 68-69); and (2) that Lt. Shaw's negative testimony that he *did not hear* Eastern cleared to land over his radio frequency, was not sufficient (in the face of the control tower operator's corroborated testimony that he issued a clearance to Eastern) to sustain petitioners' burden of proving that Eastern was *not* cleared to land. The *third* point decided was an affirmance of the jury finding that the locus of the collision was in the District of Columbia. The decision on the latter point is recorded in a subsequent order, entered on petitioners' motion to modify and clarify, and is printed in Appendix A to the petition.[5]

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[5] See the Court of Appeals order of June 24, 1955, restricting the new trial to the issue of liability, printed at pages 4a-5a of Appendix A to Petition.

See the memorandum of July 12, 1955, on Eastern's motion for rehearing of petitioners' motion to clarify or modify at pp. 5a-6a of Appendix A to Petition.

One of the *most vital contentions* urged upon the trial court and vigorously pressed in the Court of Appeals was that (independent of the three points decided) Eastern's motion for a new trial should have been granted because:

(a) The verdict was contrary to the law and the evidence, and was based on passion, prejudice, and sympathy for the Bolivian pilot. The exoneration of the Bolivian in the face of his own admissions, and the irrefutable physical facts, demonstrates the strange character of the verdict, and shows that it was based on passion, prejudice and sympathy.

Respondent argued below, and repeats here that it is impossible to reconcile the verdict of the jury with the facts, and the reasonable inferences afforded by the record. If ever a verdict was grotesque and unnatural, this one was. The jury *exonerated* the P-38 which overtook and struck down an airliner on final approach for a landing, killing 55 persons, passengers and crew; and it held the airliner liable!

The verdict exonerating Bridoux was grotesque and unnatural on its face because on his own testimony and the undisputed physical facts Bridoux's actions resulted in the death of 55 innocent persons. Bridoux testified that when he turned from base leg to final (II-431A), about four and a half miles from the airport, and at an altitude of 1100 to 1200 feet (II-433A) *he could not see* anything on the ground *nearer* to him than a point two miles south of the airport (II-444A; III-553A). Thus at 1200 feet he could not see anything on the ground for two and a half miles ahead of him. This was because the P-38 was so constructed as to limit the visibility in front and below (II-441A,

442A). He also testified he was anxious to land because of trouble with his right engine (III-523A). *He was in a hurry* (III-545A). He came in a straight descent to land on Runway 3 and did not dip his nose or tip his wings to obtain better visibility (III-557A). The collision was at the stipulated altitude of 300 feet, and it was not more than a mile from the end of the runway. Now, if at an altitude of 1100 to 1200 feet his visibility in front and below was obscured for two and a half miles, his visibility at the collision altitude of 300 can be readily computed (III-556). The angle of visibility is a constant (the structure of the cockpit), and the area of obstructed vision is reduced in direct proportion to the reduction in altitude (III-556). Thus if the area of obscured vision is two and a half miles at 1100 feet, at 300 feet altitude it is 3600 feet.

Whether these mathematics be correct within a margin of 100 or 1000 feet is of no particular moment. They do demonstrate that on his own admissions, the Bolivian pilot with a faulty engine, was hurrying into the airstrip for a landing, and was operating his plane in such a manner that he was unable to see ahead and below for a distance of 3600 feet. He could have corrected this visual limitation if he dipped his wings or otherwise changed the attitude of his plane and he did not do so (III-556A; X-2003A, 2004A). His excuse that it was not permitted (X-2004A, 2014A) is patently erroneous. No provision of the Civil Air Regulations sustains it. On the contrary it is "careless and reckless operation of a plane" where there is "lack of vigilance by the pilot to observe and avoid other air traffic" [60.12(c)]; and a "pilot must clear his position prior to starting any maneuver, either on

the ground or in flight". All planes as well as automobiles have "blind spots"—some greater than others. The court took judicial notice of that fact in *Kuhn* v. *C. A. B.*, 87 U. S. App. D. C. 130, 134, 183 F. 2d 839, 843 (D. C. Cir. 1950), and held it to be the duty of the pilot to so maneuver his plane as to compensate for these "visual deficiencies".

Indeed Section 3.382 of the Civil Air Regulations (as it then stood, 14 C. F. R. 3.382) required the pilot compartment of civilian aircraft to be so arranged as to "afford the pilot a sufficiently extensive, clear, and undistorted view for the safe operation of the airplane," and the P-38 (a military aircraft) admittedly was in violation of that Civil Air Regulation. Additionally, the plane was required to have a certificate of airworthiness (49 U. S. C. A. 560), and did not have it (III-532A).

By Bridoux' own testimony his speed at the instant of impact was 150 miles per hour. The *stipulated* speed of the DC-4 was 130 miles per hour. Bridoux admitted to a rate of descent of 500 feet per minute (II-427A). There is a substantial body of evidence that his rate of descent was considerably greater but that need not be discussed here. The conceded physical fact introduced by the petitioners' witness Pahl is that the landing gear of the P-38 crashed through the top of the DC-4 exerting tremendous downward force on the top of the transport plane (V-1012A, 1013A, 1014A).

Accordingly, accepting Bridoux' testimony at its face value, we have a military type aircraft approaching one of the busiest airports in the world, at almost high noon on a clear November day at a

speed of 150 miles per hour at a high rate of descent, with the pilot unable to see ahead and below him for a distance of 3600 feet. Such a verdict shocks the conscience of any reasonable person. This jury actually exonerated a pilot who flew the military plane, head on, into a large passenger transport liner, striking it from above and behind, resulting in the death of 55 people, without ever having seen the plane which he hit (II-440A).

It is inconceivable that a jury could exonerate a pilot in the face of such undisputed testimony, and his own admissions, unless they were moved by passion, prejudice and sympathy, which, we submit, is just what did move them. The Bolivian's testimony from the witness stand as to how, crushed and injured, he escaped from the cockpit of his doomed plane at the bottom of the river, was a moving and dramatic courtroom scene (II-440A to 450A), but when all of the testimony is fully analyzed, no reasonably fair-minded person could possibly exonerate Bridoux from liability for this disaster.

This ground for a new trial was not passed upon by the Court of Appeals, nor by this court.

(b) The next ground for a new trial was that the trial of the Tort Claims Act (non-jury) cases simultaneous with, and before the jury which sat in the cases against Eastern (while *theoretically* permissible under *U. S.* v. *Yellow Cab*, 340 U. S. 543 and agreed to by all parties) in practical operation worked a great injustice upon the corporate respondent, and deprived it of the elementary requisites of fair trial.

(i) The *first* illustration of practical prejudice to Eastern was the unproved charges of conscious "concoction" and "fabrication" repeatedly made in the jury's presence against the testimony of the Government witnesses. Eastern's captain and crew were dead—killed as a result of this collision—and this grim fact placed Eastern's case in the hands of the two other actors in the disaster, viz., Bridoux and the tower personnel. Bridoux never saw Eastern and consequently gave no testimony with respect to it. The only evidence existing as to communication *between Eastern and the control tower* (aside from fragments overheard by Lt. Shaw) was from the mouths of the tower personnel. There were no other living witnesses. Eastern was compelled to rely on their testimony, or to offer no testimony. Bridoux could not testify as to the tower's instruction to Eastern because (being on a different frequency) he did not hear the transmissions. Lt. Shaw could not give the whole story because he was not on that frequency (119.1 megacycles) at all times and could testify only to what he heard while he was on that frequency and listening. In the nature of the situation, therefore, that whole area of the case dealing with communication between the DC-4 and the tower, was uncontradicted, and was also confirmed by the actions of the Eastern plane in response to it. From the very day of the accident, these tower witnesses had unanimously exonerated Eastern of all blame in written statements. (Tigner statement, Eastern Ex. 5, XI-2160A; Union statement, Plaintiffs' Ex. 28, XI-2158A.) Obviously, therefore, unless petitioners could inject confusion, prejudice, passion, and bias into the picture, the uncontradictable testimony of the tower witnesses would entitle Eastern to a verdict.

The method adopted was to destroy those witnesses; to charge, openly, before the jury that the testimony of all tower witnesses was collusive; that it had been "fabricated and concocted"; that the flight strips were "doctored"; and to promise that affirmative evidence in support of these charges would be later adduced. When the trial closed no such evidence had been offered. The Trial Court, of course, so instructed the jury in its charge (X-2092A, 2093A), but the harm had been done.

The charges were first made during Bridoux' cross-examination of Tigner, the Government employed air traffic controller, whose uncontradicted testimony was that the DC-4 had followed his instruction to the letter, and that he had cleared it to land. At a bench conference counsel for Bridoux and for petitioners told the court that the testimony of Tigner and the other men in the tower "is concocted and was concocted on November 1" (VI-1340A, 1341A); that the flight strips (tower records of departure and arrival of planes) were deliberately "doctored" (VI-1339A). Thereafter Tigner was cross-examined at length (VII-1399A to 1408A) on his written statement (Eastern Ex. 5, XI-2160A), and counsel stated in the presence of the jury that he would produce evidence to show that there was coordination among the tower witnesses in the preparation of their statements (VII-1401A). A systematic attempt was made, by suggestive questions, to convey to the jury, the impression that the tower men had met and coordinated with Civil Aeronautics Administration officials for the purpose of agreeing on a story, but it elicited only denials from the witness (VII-1402 to 1408A), and the court directed counsel to discontinue that line of interroga-

tion (VII-1408A). However counsel returned to it again and again (VII-1528 to 1531A, 1538A). He again assured the court *in the presence of the jury* that he was prepared to offer proof of conscious fabrication (VII-1529A) but he refused to furnish the names of the witnesses (VII-1535A), and the court pointed out the serious prejudice to Eastern (VII-1533A). The bench colloquy at VII-1535 to 1537A is particularly significant. Here again "the questions and not the answers were what the petitioners thought important. The purpose of the question clearly was to keep persistently before the jury, the assumption of damaging facts which could not be proven * * *" *People* v. *Mullings*, 83 Cal. 138, 23 Pac. 229 (1890).

About at this point the Trial Court, sensitive to the courtroom atmosphere, commenced to realize the harm being done to Eastern by these repeated charges, and after excusing the jury, stated "It is very serious from the standpoint of Eastern Air Lines" (VII-1533A). These charges, theretofore confined to the written statements, had been imperceptibly transformed into accusations that the whole testimony of the witnesses on the stand had been collusively fabricated.

But the systematic effort to prejudice Eastern did not stop here. During the testimony of Donovan Davis, another tower operator, cross-examination on the written statements was resumed (VIII-1581 to 1583A), and the charge of "concoction and fabrication" again aired, this time by counsel for Bridoux (VIII-1580 to 1583A), who was forced to admit that he had no evidence to support his charge, except what he hoped to elicit by cross-examination (VIII-1584A).

At this point the trial court, fearful of the effect upon the jury, stopped further interrogation. The bench colloquy at VIII-1583 to 1585A reveals the court room atmosphere.

But the reiteration of these unproved charges did not stop there. When Robert Union, another tower controller, was under cross-examination (although he had previously been called as petitioners' witness, IV-723 to 764A), he was sharply attacked with charges of concoction and fabrication and in the presence of the jury petitioners' counsel states "It is the contention of the plaintiff that C. A. A. got all the tower men together and each told what they knew, and they then started preparing statements to blend their stories" (VIII-1632A). There then ensued a colloquy in which the words "fabricate", "fabrication", "conspiracy" and "influence" were freely employed (VIII-1633A, 1634A). Counsel then withdrew his charge of "a specific intent to falsify" in favor of "the influence of other people * * * in the preparation of the statement" (VIII-1634A). Cross-examination on the latter point likewise came to naught (VIII-1634 to 1637A).

The situation reached its climax, late in the trial. On the cross-examination of Clarence Stock, Chief of Airways Operation Division, C. A. A., petitioners' counsel advised the court (out of the presence of the jury) "* * * I still will not say that there is anything intentionally done wrong * * *" (IX-1847A). However he returned to the charge of concoction and fabrication on the testimony of Rydstrom (a former tower operator), the last witness who testified before the case went to the jury (X-2059 to 2073A).

The examination of that witness was unparalleled in this long and hard-fought trial. Eastern had no part in it. The attention of the court is especially directed to the colloquy and the court's examination of this witness at X-2064 to 2075A, all of which took place in the presence of the jury, with the issue of "fabrication" again stated by the court at X-2067A. Rydstrom was an unfortunate young man who had just been discharged from Perry Point Veterans Hospital where he was treated for severe accidental physical injuries, and manic depressive psychosis (X-2081A, 2082A). He made a written statement of the accident which was absolutely his own, from beginning to end (X-2070A), but he thought Stock had made some suggestions to the point of impact, etc. (X-2079A, 2080A), but "Mr. Stock did not pick out the point. It was a general mulling over" (X-2080A).

The prejudice of these repeated episodes led the Trial Court during the testimony of Rydstrom to say to petitioners' counsel:

> "You are prejudicing the case of Eastern and Bridoux"
>
> * * * *
>
> "You have left the inference to be drawn that the statements which are merely collateral for use for impeachment, you have left the inference that the witness' testimony of the circumstances are fabrications and concoctions." (X-2076A)

and to warn the jury and repeat:

> "I will inhibit any further inquiry on this.
>
> Members of the jury, this concerns only the plaintiff and the United States. It doesn't in-

clude the plaintiff and the other defendants." (X-2080A)

* * * *

"In other words, I want to make it absolutely clear to you, members of the jury, that as far as you are concerned, you are not concerned with his testimony at all. It is for the benefit of the Court in relation to the case of the plaintiff against the United States." (X-2082A)

Confronted by the continued and persistent repetition of unsupported charges throughout the long trial, Eastern moved, at the close of all the evidence, to strike from the record (as to it) all statements of counsel pertaining to fabrication, concoction and conspiracy (X-2083A, 2084A), and further moved to strike all statements of counsel as to the similarity between the statements of the tower operators. These motions were denied (X-2084A).

In its charge, after nine weeks of trial, and the testimony of 48 witnesses, the Trial Court sought to remove from the minds of the jury what it recognized as prejudice engendered by these repeated charges (X-2092A, 2093A). The jury was told that these charges "like Banquo's ghost", have "been recurring in the course of this trial"; that although counsel first claimed the written statements were fabricated, and concocted (X-2092A), that charge had been withdrawn (X-2092A, 2093A) and the jury was instructed to "dispel that from your minds, because counsel have said that there is no charge of fabrication and concoction or subornation of perjury, if you will, in this case." (X-2092A, 2093A).

The crippling prejudice created by these repeated charges in the long trial could not be neutralized or

removed by a few words in the course of a long instruction, particularly *after nine weeks of trial.* The atmosphere of passion and prejudice engendered by them became too fixed. It deprived respondent of a fair trial, *New York Central* v. *Johnson,* 279 U. S. 310 (1928); *Throckmorton* v. *Holt,* 180 U. S. 552, 567 (1900); *Hockaday* v. *Red Line,* 85 U. S. App. D. C. 1, 174 F. 2d 154 (D. C. Cir. 1949); *Knuckles* v. *Weathersby,* 63 U. S. App. D. C. 276, 277, 72 F. 2d 69, 70 (D. C. Cir. 1934); *Zinkhan* v. *D. of C.,* 50 U. S. App. D. C. 312, 314, 271 Fed. 542, 544 (D. C. Cir. 1921); *Knickerbocker Trust Co.* v. *Evans,* 188 Fed. 549, 567 (1st Cir. 1911); *Jas. Stewart & Co.* v. *Newby,* 266 Fed. 287, 295 (4th Cir. 1920); *Middleton* v. *U. S.,* 49 F. 2d 538, 540 (8th Cir. 1931); *Maytag* v. *Cummins,* 260 Fed. 74, 82-83 (8th Cir. 1919).

(ii) The second illustration of practical prejudice to Eastern is the fact that the jury heard all the evidence adduced against the government in the non-jury, Tort Claims, case. There were many good *theoretical* reasons for trying the non-jury cases against the U. S. and the jury case against Eastern, together. The cases involved the same accident, and a large area of identical fact. *U. S.* v. *Yellow Cab,* 340 U. S. 543 (1951) had removed the procedural difficulties and undoubtedly considerations of economy suggest that the cases be tried together. That is why the parties consented to this consolidated trial. But their consent was to the traditional "fair trial" which is assured to all litigants, not to the kind of a trial which this one turned out to be. The case at bar is a perfect example of a situation in which jury and non-jury cases should *not* be tried together. The trial court so remarked (VI-1289A).

We believe we have shown above the unsuccessful effort of the Trial Judge to remove the blot of "fabrication and concoction" from the jury's mind, and his ruling (in which petitioners acquiesced) that it had nothing to do with Eastern (X-2080A, 2082A). But all of the evidence adduced by the petitioners in support of their case against the United States was heard by this jury. Great segments of the evidence had no materiality or relevancy whatever in respect of petitioners' case against Eastern. Petitioners' case against the United States was a sharp and bitter assault on the operation of the control tower, and upon the honesty and integrity of the air traffic controllers. Indeed in his opening statement petitioners' counsel promised the court and jury that he would show that the tower personnel was so careless and inattentive to their duties that they cleared two planes to land upon the same runway at the same time (I-63A, 64A), and that is exactly what petitioners set out to do. Now if the tower did clear two planes to land on the same runway at the same time obviously that fact should have exonerated Eastern. Those same tower witnesses (the only witnesses in a position to implicate Eastern) exonerated Eastern from all blame, and testimony in this respect was uncontradicted. However, every shred of evidence adduced by the petitioners to establish its case against the Government was heard by the jury. Every witness was seen by the jury. The repeated exchanges between petitioners' and Government counsel all took place in the presence of the jury. The innumerable bench conferences requested by petitioners' counsel or Government counsel on matters exclusively pertaining to their own case could not but have influenced the jury in a manner and to a degree which cannot be measured.

Glen Tigner was on the witness stand for four solid days. During a long and bitter cross-examination there were repeated episodes of acrimony between counsel. The same was true, though to a lesser degree, during the examination of the other tower witnesses, Davis, Union and Seltzer; and also during the examination of Stock. As far as respondent Eastern is concerned neither Tigner, nor any other tower witness had any motive whatsoever, other than the truth, for exonerating Eastern. *As a matter of fact the control tower operators could have exonerated the Government by placing the blame on Eastern.* It necessarily follows from the verdict that the jury disbelieved the tower witnesses to the extent that their testimony was in conflict with that of Bridoux. There was no warrant in the evidence for disbelieving them on the transmissions to the DC-4 because (1) that testimony was uncontradicted, and corroborated, and (2) there was no other evidence upon which Eastern could be held liable.

Thus we say that Eastern, an innocent party in the bitter controversy between petitioners and the United States, was gravely prejudiced by the unanticipated course which this trial took; and that all fault which petitioners charged against the Government witnesses was unconsciously imputed by the jury to Eastern.

* * * *

By statute (28 U. S. C. 1291) and rule (Rule 73 F. R. C. P.) respondent was given the right of appeal to the Court of Appeals from the District Court's denial (I-54A, 55A) of its motion for a new trial on the grounds last specified (I-53A). That right was preserved to respondent when the Court of Appeals granted a new trial on other grounds. In so doing

the Court of Appeals remarked that it was unnecessary to decide the other grounds urged (See 221 F. 2d 62, 73; and see memorandum at pp. 5a-6a, Appendix A of Petition). On remand the District Court would have been free to decide all issues not disposed of by the Court of Appeals. *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356; *Northern Pac. Ry. Co.* v. *Concannon,* 239 U. S. 382, 387; *Christoffel* v. *U. S.,* 214 F. 2nd 265, cert. den. 348 U. S. 850. The *per curiam* order of this Court, wholly reversing this non-final judgment, has the effect of depriving respondent of its statutory right of appeal on these specific grounds.

As a minimum of relief to respondent in this extraordinary situation, it is respectfully submitted that if the writ is not to be dismissed as improvidently granted, the case should be remanded to the Court of Appeals for decision on those points expressly left undecided by the Court of Appeals. As Mr. Justice Black said in his dissenting opinion in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 231 at page 250:

> "Surely before this Court determines the existence of a contract and the scope of its coverage the case should be sent back to the trial court so that these issues could be determined after a full hearing on the facts. The issues were not tried in the District Court and not tried in the Court of Appeals. The issues have never been tried. In *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, we remanded a case to the trial court for a hearing on evidence as to the scope of a contract of indemnity even though it was written."

V

The *per curiam* order should be vacated for the further reason that the Court of Appeals erroneously decided, and this Court did not review, a major issue of law under the Federal Administrative Procedure Act; and because its decision in this regard is in conflict with a decision of the Court of Appeals for the Ninth Circuit.

Overruling respondent's contention, both the District Court and the Court of Appeals decided that the Washington National Airport landing pattern, although not adopted in accordance with the rule making processes specified in the Administrative Procedure Act, (60 Stat. 277, 5 U. S. C. A. sections 1001 (c), 1002 (a) (3), 1003) and never published in the Federal Register, nevertheless constituted a binding Federal regulation, breach of which would be negligence *per se* (See 221 F. 2d 62, 65, 68-69). In so holding the Court of Appeals decided a question of great public interest, viz, that a purported Federal Regulation, not adopted in the manner specified by the Administrative Procedure Act, nevertheless has existence and validity, if one has knowledge of it. Respondent did not cross petition for certiorari to review that ruling (or indeed any ruling of the Court of Appeals) because the judgment merely remanded the case for a new trial. Such questions would become proper for review by this Court only after they had ripened into a final judgment.

In ruling on this point the Court of Appeals expressly declined to follow (See 221 F. 2d 62, 69) a contrary decision of identical character, by the

Ninth Circuit. The latter case was *Hotch* v. *U. S.* 212 F. 2d 280. There Hotch was convicted of violating a Department of the Interior regulation closing the waters of Taku Inlet to commercial fishing. His conviction was affirmed by the Court of Appeals for the Ninth Circuit, 208 F. 2d 244, but on rehearing Hotch claimed for the first time that the purported regulation never came into existence because it had not been published in the Federal Register. On such rehearing the conviction was reversed 208 F. 2d 249. On re-rehearing the court adhered to its decision of reversal, 212 F. 2d 280.

The effect of the Court's *per curiam* decision of December 5, 1955 on this major and far reaching question of law is indeterminate. The order reverses the judgment of the Court of Appeals without expression of the reason therefor. If such reversal is to be taken as reversing the judgment *in toto,* then the Court of Appeals ruling on the landing pattern is reversed, and this Court's order of reversal means that the District Court erred in admitting it into evidence. The necessary effect is a reversible error requiring a new trial.

On the other hand if the *per curiam* of December 5th was *not* intended to reverse the judgment of the Court of Appeals as to the validity of the purported Federal regulation, then respondent has been deprived of the opportunity to seek review in this Court of a major federal question, of universal importance under the Administrative Precedure Act, decided by the Court of Appeals in a manner flatly contrary to another circuit.

Conclusion

The *per curiam* order of December 5, 1955, granted certiorari and simultaneously reversed a non-final judgment of the Court of Appeals which involved only its own facts, and which remanded the case for a new trial, leaving several major issues undecided. It is respectfully submitted that the writ was improvidently granted. Rehearing should be granted, and upon such rehearing the *per curiam* order of December 5, 1955, should be vacated and the writ dismissed as improvidently granted. Alternatively so much of the order as reversed the judgment below should be vacated, and the case should be placed on the calendar of this Court for briefs and oral argument on the merits of all issues. As a further alternative, the order of December 5, 1955, should be modified so as to remand the cause to the United States Court of Appeals for the District of Columbia to permit that Court to pass upon the several issues left undecided.

Respectfully submitted,

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Certificate

I hereby certify that this petition is presented in good faith and not for purposes of delay; and I further certify that copies of this petition have been served upon counsel for the petitioners by delivering the same to their office 1001—15th St., N. W., Washington, D. C., this 24th day of January, 1956.

RICHARD W. GALIHER
Richard W. Galiher

No. 298. UNION TRUST CO. ET AL. *v.* EASTERN AIR LINES, INC. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed.* MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN would not grant certiorari. *David G. Bress, Sheldon E. Bernstein, Alvin L. Newmyer* and *Jo V. Morgan, Jr.* for petitioners. *Joseph W. Henderson, Richard W. Galiher* and *John M. Aherne* for respondent. Reported below: 95 U. S. App. D. C. 189, 221 F. 2d 62.